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APPELLANTS' APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,167
CARL C. SMUCK
a Member of the Board of Education
of the District of Columbia,
Appellant

v.

JULIUS W. HOBSON, *et al.*,
Appellees.

No. 21,168
CARL F. HANSEN,
Superintendent of Schools of the
District of Columbia,
Appellant,

v.

JULIUS W. HOBSON, *et al.*,
Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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for the District of Columbia Circuit

FILED JUN 11 1968

VOLUME V

Nov

1002

(i)

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MR. KUNSTLER: Well, since there is no objection, Your Honor, I will go ahead.

MR. CASHMAN: I wanted to point out it was beyond the scope of the direct, sir, and I might, if it gets to be too lengthy, I might stand up and object.

THE COURT: All right.

BY MR. KUNSTLER:

Q Dr. Carroll, would you indicate why, for fiscal '69, or for fiscal '68, you did not submit the model school budget, if that was the ideal?

A Well, the ideal---and here again every assistant superintendent in charge of their own area of specialty, for their own reasons, and I should say because of time limitations, without careful analysis or study on a staff-wide basis of each individual area, were to put in exactly what they thought was needed in the elementary and the secondary schools, and so forth. The major problem was that when you came out with this budget you ended up with a professional staff per thousand of 81. Eighty-one professional staff per thousand would have been what the Pucinski budget -- if we may use that term -- I trust Representative Pucinski will not mind -- the Pucinski budget required 81 professional staff per thousand. Now, to put this 81 into context, sir, you must realize that in, two years ago, 1965, I believe it was, because we are now in the '67 budget, fiscal '65,

we had in the District schools, and housed in the District schools, 42 professional staff per thousand, and we have now moved up, after this budget goes through, we will have 54 professional staff per thousand, but we need to have a place to put these people. We wouldn't have a building to put this kind of staff in. We haven't got the space to operate with 81 professional staff per thousand in the District. It just isn't here. Now, we do have a capital outlay, a six-year capital outlay program, which is over two hundred million dollars proposed in the '68 budget, and we are requesting about sixty million dollars in capital construction for this first phase of it. A large amount of this, of course, is in sight and planned, because you have to request an order, do these things in sequence. So the capital budget much more closely reflects the level the Pucinski budget was discussing than the operating budget because we had no place to put the staff.

Q Well, you are using the capital budget that you're using, this figure of two hundred million, I believe, that's a six-year plan, isn't it?

A Yes, it's a six-year plan.

Q And the Pucinski budget is a one-year plan; isn't that correct, a one-year budget?

A It was really an indication of what would be needed in 1967 in order to operate a model school system. It had to

MR. REDMON: Also, Mr. Clerk, there are four other documents that I will ask you to mark by number, if you can do it, in chronological fashion here.

THE DEPUTY CLERK: Defendants' Exhibits No. 96, marked for identification; Defendants' Exhibit No. 97 marked for identification; Defendants' Exhibit No. 98 marked for identification; Defendants' Exhibit No. 99 marked for identification.

(Defendants' Exhibits Nos. 95, 96, 97, 98 and 99 marked for identification.)

BY MR. REDMON:

Q Will you state your full name, please?

A Teresa B. Posey.

Q Are you employed in the D. C. Public School System, Mrs. Posey?

A I am.

Q In what capacity?

A I am principal of the Maury Elementary School.

Q Where is the Maury Elementary School located, Mrs. Posey?

A It is located at Thirteenth and Constitution Avenues, Northeast.

Q Mrs. Posey, with respect to education beyond high

school, would you please tell us what your education is?

A Yes. I have B.S. -- my Bachelor's degree from the Miner Teachers College.

I have a Master's from the Catholic University of America.

I have done graduate work at New York University, Catholic University, and Linden University in Missouri.

Q Mrs. Posey, before you became principal of Maury School, had you had any prior experience in the District of Columbia Public School System?

A Yes. I was a teacher in the District schools.

Q Would you tell us what schools you were a teacher at?

A Yes. I taught at Smothers Elementary School, in Northeast Washington for about a year.

I taught at the Grimke Elementary School for about two years, and then to the Morgan Demonstration School at that time for about ten years.

Only there was a short period at Garrison School, I beg your pardon, before going to Morgan.

Q Is all your experience in the elementary schools, Mrs. Posey?

A Yes.

Q Now, with respect to the various schools that you

have mentioned, will you tell us which one of those schools or which of those schools you taught at while there were two divisions in the D. C. Public School System?

A Well, each of them really, because I was at the Morgan School from 1950, you see, which was prior to integration.

Q These were Division II schools?

A Yes.

Q Now, how long have you been principal of the Maury School?

A Since the fall of 1959.

Q Would you give the boundaries of the Maury School?

A Yes. On the south by East Capitol Street; on the east by Fourteenth Street, Northeast; on the north by C Street; and on the west by Twelfth Place.

Q Mrs. Posey, other than your function as principal of the Maury School, do you serve any boards of education outside the District of Columbia system?

A Yes. I am a member of the Board of Education for the Archdiocese of Washington.

Q Are you affiliated with the Inter-religious Conference on Race Relations?

A Yes. I have been a member since its beginning.

Q Mrs. Posey, since 1959, as principal of the Maury

School, will you give us in the neighborhood which your school serves the racial composition, that is, is it a predominately Negro neighborhood?

A It was a predominately Negro neighborhood at the time that I went there in 1959 and it still is. The pattern hasn't changed greatly.

Q Do you have any white students in the Maury School?

A Yes, there are white students there at present.

Q Roughly, how many would there be?

A Approximately 10.

Q What is the present population of the Maury Elementary School?

A Approximately 525 children. It varies.

Q Mrs. Posey, at my direction, did you undertake for the years 1962-63; 1963-64 to establish the so-called mobility pattern in the student population?

A I did.

Q Will you tell us for the years 1962-1963 how many children you had transfer into the Maury School during the school year?

A Yes.

There were 200 children or 28 percent of the school population that entered by transfer from other Washington public schools.

We recognize these as E-4's. E-4-A. A to distinguish transfer within the building.

E-6. These are children who enter from other sources. In the year 1962-63 I had 142 of these or 18 percent of my school population.

This meant that 342 or 45.7 percent of the children in the Maury school entered during that year.

Q Now, with respect to the entrance to the Maury School from other sources and other schools, how many of those children came from out of state?

A 71 or nine percent that year.

Q Mrs. Posey, you checked these records. Will you tell us where the majority of these children come from with respect to states?

A Most of them are from the southern states, North Carolina, South Carolina, and beyond.

Q Now, with respect to the year 1963-64, again give us those figures.

A Yes. 216 or again 28 percent of the school population entered by transfer from other District public schools.

There were three that year that entered from parochial schools by transfer and there 153 that entered from other sources.

83 of those entered from out of state.

Q And again, Mrs. Posey, the same pattern with respect to the migration from southern states?

A Correct.

Q Mrs. Posey, at my request, did you check the records of some of your present student population in terms of who these people were living with at the present time?

A I did.

Q Would you tell us the figures?

A Yes. From our Form 29 report which gives us a record of legal residences of our children, I found that 299 of our children or 61 percent lived with both parents.

162 or 33 percent lived with the mother only.

Two or .04 percent lived with the father only.

19 or .4 percent lived with other relatives, and these are usually the grandmother or an aunt or uncle.

Three of these children are living with foster parents and five them are living with legal guardians.

Q Now with respect to the occupations or lack of occupations in the guardians or parents of these children, Mrs. Posey, did you make a survey with respect to the students in your school?

A Yes, I did.

I found that 14 of the parents may be given what

might be termed professional status.

Q What would you consider professional status?

A Educators, doctors, lawyers, professional accountants, people of this sort.

There are 49 who would be semi-professional, supervisors in Government, clerks, typists, this type of thing.

60 of them are unskilled. This would be the laundress, the domestic worker.

55 are skilled laborers. These are the barbers, the mechanics, people of this type.

81 were laborers. These are men who work on construction jobs, who simply do the heavy work.

And 40 of the families are on welfare.

Q Now, with respect to the factors that you have just discussed, Mrs. Posey, there is, one, mobility of student population and the fact, as your figures indicate, you may find as many as 48 percent of the children moving in during the school year.

Will you tell us what effect this has on you as a principal in terms of setting up class schedules, and attempting to education these children?

A It has a drastic effect because in our planning for a school year we evaluate the school program at the close

they are recommended for a special academic placement. The regular curriculum is exactly what the name implies, the general plan of education, and the honors curriculum is for the accelerated child. It offers grater challenge, based on the greater curriculum, but greater challenges in work.

Q Now, in each of these curriculums are you attempting to teach, for example, the skills of all of these children irrespective of their placement; the question of degree with respect to the intensity?

A This is correct.

Q Have you had any children who have been recommended to special academic curriculum?

A Yes, I have.

Q Do you have any such class this year?

A This year I have what I place under the title of an innovation, something that I am trying because of a change. Possibly I will have to exchange this, change so that you will understand this. But the last school year to relieve the drastic overcrowding -- my building capacity is 500 children -- last year we had more than 900, anywhere from 922 to 940 in the building at one time. This past June we were given relief by the building of the new Gibbs School in our school area and I lost 400 children by transfer to the Gibbs School. This was done by a boundary change. My boundary was moved from 17th

Street to the present 14th Street and, of course, all children in that area went to the Gibbs School. With this change I lost practically all of my special academic children that were in that special academic class at that particular time.

To be placed in the special academic class, of course, you know there is a procedure that is necessary. The one that we followed is that, first, the teacher recommends that this child receive a special attention. I observe the child in the classroom situation, I talk with the child and the counselor talks with the child and works very closely with the child. When we feel that we do have ground for requesting special testing of this child we do so through a form that we call 205. It is sort of a case history of this child. We present this case history or this form to the Pupil Personnel Department requesting that they test this child for probable placement. And then how they come out and on their recommendations and including conferences with parents and any other facets that might be involved, if we feel the displacement is best for the child the child is placed on special academic. I noted in the fall there were only six children left in my special academic class and, since we were invited to make innovations in our program I felt this gave me a marvelous opportunity to try a program that has been dear to my heart since I had two experiences last year, one with Dr. Long and

We are not interested in some brand new idea of yours. This is a lawsuit.

THE WITNESS: I understand.

THE COURT: We are trying to determine whether or not the track system is discriminating. That is, apparently, one of the purposes you were put on the witness stand. Now, whether or not you conceived some brilliant new plan has no affect on this lawsuit. It might affect some future lawsuit but right now we are interested in this particular subject.

I think, Mr. Redmon, if you took her over and got more pertinent to some of the issues this case raises we could move along.

MR. REDMON: Very well, Your Honor.

BY MR. REDMON:

Q Mrs. Posey, you indicated you have had special academic classes?

A Yes.

Q You have already indicated the method of placing the children in the curriculum. Would you please tell us, from your own experience as a principal and as a teacher, why such a placement is made?

A This gives the child the opportunity to progress at his own rate. It also puts him in a situation where there are fewer children, the 17 or 18 expected maximum. Sometimes

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we get 20 there. But here the teacher is able to give individualized help to this child to help him advance.

Q Once the child is placed in special academics does this mean he will stay in special academics the rest of his time in school?

A Oh, no, he only stays there until we find he is ready to go back to the regular curriculum. After a child has been in special academics a while and we feel he is good enough to take his place in the regular classes he is then sent into the other classes for specific subjects, usually the social studies, the sciences and language. After he has worked into these classes for a while the classroom teachers plus his special academics teacher confer -- and with the counselor and with me -- and if they feel that this child is now ready for the regular curriculum we, again, submit the 205 requesting proper placement again, but back into the regular class.

Q Is there any time during the day when the child who is curriculum special academic will be with the rest of the school population?

A Oh, yes, for the general school activities. This child participates in everything, such as the Red Cross, general assembly, physical education, music, and art. He is participating on a building-wide basis or grade level basis.

Q Mrs. Posey, do you have any temporary teachers at your school?

A Oh, yes, I do.

Q How many temporary teachers do you have?

A Twelve.

Q And how many, so-called, permanent teachers?

A Six.

Q Mrs. Posey, have you ever during the time that you have been a principal -- Let me rephrase that question. As the principal of an elementary school, Mrs. Posey, would you tell us how and why you select people to teach at your particular school?

A I choose a teacher chiefly on her ability to teach children well, her rapport with children, her understanding of children. I say "ability to teach children". This is different from her ability to teach the curriculum, but to actually develop these children.

Q Now, have you had any situations in the last couple of years where you have requested transfers of teachers from your particular school?

A Yes, over the past two years, before this major change, I have asked that a couple of permanent teachers be removed from my school because I felt that they were not able to give the children the kind of teaching that I wanted for

them; and I thought they may be able to do better in another situation. But having been with me six or seven years and still not being able to accomplish this, I felt in another situation they might do better and I might find somebody who might do better for the children.

Q Do you find any difference between the ability of teaching with respect to a temporary and permanent teacher?

A Absolutely none. The title temporary or permanent has nothing to do with the teacher's ability to teach.

Q How do you evaluate or watch or keep check on the teachers in your particular school?

A Well, there is an evaluation sheet that we use city-wide for evaluating teachers. There are also many excellent materials that have come recently through the supervisory department to help teachers with teaching. These I go over very carefully with my teachers at the faculty meetings to see that they understand what is expected of them and what I am looking for when I come into a classroom, and that we see eye to eye with the supervisor who is there to help us.

In addition to this, I prepare a check list or I keep forms. One is a check list that I present at the beginning of the year to my teachers after we have gone over it each year at a faculty meeting to tell them what I am looking for in their ability to know a child. What have you done?

What evidence can you give me that you know this child and its needs? It also includes room environment, what sort of atmosphere have you created for learning? With this information in hand, the same check sheet that I use each teacher has, and I devise my check sheets directly from the supervisory folder. So with this in hand they have an opportunity to set up the kind of environment that we agree is conducive to good learning. And then I visit the classrooms and I evaluate. On the basis of my evaluations I have a conference with the teachers. If they are excellent I leave a note to this effect, but if I feel that I need to confer with the teacher about her room environment then I do, followed by a conference, and that is put into her jacket. But there are five times, at least, that I go in to look the same situation over, because it can be excellent in September and change. And so I check it during the year, not with the idea of checking on this teacher because you are not doing what you are supposed to do, but because I, as her principal, can offer suggestions which can help her develop the kind of environment that we want.

I have another form which I use when I go in simply to observe the teaching of a lesson. This, again, I write up and confer with the teacher and she is free to look at the notes that I have taken. Usually, she will take notes from this so that she knows how to improve. We can agree

quite often that maybe a supervisor can help, or I suggest, or if I have material that I feel would help her I put it in her box so that there is a constant inservice program, if you want to call it that.

Q Mrs. Posey, it has been alleged in this lawsuit that the so-called track system discriminates against Negroes and lower economic students. In your experience with the operation of the three-track curriculum in your school, is that true or not true?

A I don't think this is true. I think it has given me an opportunity to set up programs or to pace the programs so that it better meets the individual needs of our students.

If, for instance, a child were discriminated against, it would mean to me that he would get into a situation and there was no way out, but with a flexible handling of this program it slows down the pace until the child, shall we say, catches up or catches his breath and finds himself and moves along. In this case the child can move up or down, either way. At the end of each school year and this May conference time that I have spoken of earlier, the teacher comes in and I discuss an individual's record card. This is done on every child that comes to the Maury School at the end of the year. I send the card back to the teacher to indicate the child's reading level. There is a section titled "Comment" and she gives her own

comment on this child's ability. Quite often she says "not working up to fullest potential" or "working beyond what we expected of him or her". And I may suggest that he move on into a faster moving class, because, you see, even within that range of a general or regular class there will be maybe three classes who are moving at different levels along that line because of the different factors involved.

But when we have discussed this child and I set up the classes for the next year we can actually set it up right there, the teacher and I together. And this child should move back here, and maybe if he were to move with a slower group he will make it through that grade level next year. So he drops down.

The same thing with the special academics, as I explained to you. When we feel this child has made the grade and is ready for testing, he is tested and moved out of special academics into a regular group.

Q Mrs. Posey, in your experience as a teacher, have you taught both heterogeneous and relatively homogeneous groups?

A Yes.

Q Do you have any opinion with respect to which of them appears to be the most favorable way of educating a child within a classroom requirement?

A As a teacher I prefer the homogeneous grouping. It shortens the range and allows the teacher to give a more concentrated effort on developing this ability. I have had a class under the heterogeneous plan where abilities ranged from say 2.2 in reading through 4.5 or, what have you, or 4.2. Well, then you see what this requires of a teacher who is conscientious and who is really going to try to do a job of meeting the needs of all these different children. But bring this closer together and say the range is broken down from 2.1 to 3.1. Here is a very different pattern of things altogether. With a closer range there is a great deal of opportunity to do more mass teaching where you can present the entire concept and then break down into your small groups where you can meet better the individual needs of your children at their grade level. An example of this would be alphabetized, alphabetical order, as we call it, in the grade level. We would teach the concept of arranging words in alphabetical order but then if one wanted to give degrees in this I would apply this to the grade the child is reading. If there is a question of the three levels or two levels, fine. But if it is spread over a long range you are going to have difficulty sometimes setting up the kind of program with these children down here [indicating with hands] that you want here. The range is too big.

Q You have been principal now of the Maury School for seven or eight years, and it is what is known as a neighborhood school, is that correct?

A Yes.

Q Would you tell us, please, what are the advantages that accrue to parent, teacher and child from having a so-called neighborhood school in the elementary grades?

MR. KUNSTLER: Your Honor, I object. I think this is a very general and broad question, as to the advantages of a neighborhood school. I don't think I have a basic objection to her answering but I would suggest that it is irrelevant to our considerations here.

THE COURT: Is the neighborhood school concept a part of this case?

MR. KUNSTLER: Yes, but I am talking about the witness' opinion as to benefits of a neighborhood school.

THE COURT: I think we will get it more quickly if we let her answer the question the way it is stated rather than breaking it down. Perhaps you might want to break it down on cross. I overrule the objection.

MR. REDMON: You may answer the question.

THE WITNESS: Maybe you could ask it again.

THE COURT: The reporter will read the question.

[The pending question was read by the reporter.]

THE WITNESS: It is almost like a family school.

Your faculty becomes another arm of the family. There is such close contact here that you build the kind of confidence that you want with the parents. The parents believe in the job and understand the job that the school is trying to do for the child. And for the teacher it is just the reverse. Here there is a close working together between the teacher, parents and child. In our situation, if Johnnie doesn't show up at 1:00 o'clock the teacher is downstairs on the phone in just a moment, or there is a note that comes down to the counselor or secretary to please check with Mrs. Jones and find out what happened to Johnnie. She kept Johnnie at home because he had a toothache, but you forgot to remind us and send us a note. So there is a kind of contact. And the child sees the unity and he feels the closeness of his home and his school working together for him. Where there might be a breakdown in the home he feels he has the school to turn to that is going to understand his problem and is going to help him. - If there is dissatisfaction in the school he can go home with his problem and know mama and the school can get together to see what can be done. There is this close communication and there is this understanding that we have. The door is open to my office and to the counselor's office and constantly conferences are scheduled with the teachers. In fact, the

teacher's day is so arranged as to make these conferences possible for parents. The teacher does not have any duty between 12:00 and 12:30. This is for her lunch but she can quite often share this with a parent who comes up to pick up a child, a little one at 12:00. So we can arrange for a conference. And the counselor and I have the duty during the lunch hour to free teachers. Teachers stay from 3:00 to 3:30, or if it is inconvenient for a parent the teacher will drop by the house to see the parent.

BY MR. REDMON:

Q Mrs. Posey, I have one more question for you which I forgot to ask. Are there any so-called in-service programs going on in the school system which affect the teachers?

A Oh, yes, to the point that it is really, it is such a marvelous job for me that it sort of curtails my own program a bit. But we do have an in-service program within the building that the teachers themselves plan based on their needs where they feel they need help. We call in people who can help. But this year the Supervisory Department has set up some clean workshops for our teachers. Today, in fact, some of my teachers, primary teachers, will go across or around to another school where there is a social study workshop, where they are not only presented this material that you find in the curriculum folder, but where this material is gone over with

[After recess
11:45 a. m.]

MR. REDMON: Your Honor, there are two exhibits which are marked for identification which I forgot to have Mrs. Posey identify. I do want to move them in evidence.

BY MR. REDMON:

Q Mrs. Posey, I will ask you to identify defendants' exhibit 96, please?

A All right.

Q Tell the Court what it is, please.

A This is the check sheet that I just mentioned that I used in observing and checking on teachers.

Q I ask you to identify defendants' exhibit number 99, Mrs. Posey? You may have to explain that a little bit.

A This is the report that was just submitted to Dr. Johnson at the end of the last school year of the Committee on a Field Trip. I was Chairman of that Committee. We worked during the year to set up field trips that we felt would correlate with the social studies curriculum as spelled out in the guides as a subject for the further development of concepts and experiences for these children. There are 105, I believe, suggested trips and necessary information for the teacher. Along with that, there is the plan for the teacher to follow in planning for and following through on.

MR. REDMON: If Your Honor please, I move the

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but as to the last part you may ask her that question because I think that was raised on direct.

BY MR. KUNSTLER:

Q Do you understand what is meant by the expression used by your counsel, whether the track system discriminates racially?

A As I understand what you are asking me now, you are asking whether the track system provides equal opportunity of education for children on the basis of their race? Is that what you are saying?

Q That is not quite the way I am saying it. He asked you, I believe, whether you thought the track system, as administered, discriminated racially. And I would like to know what you mean by that.

A I was thinking of it in terms of my own experience in my own school. And in my school it certainly couldn't discriminate racially because I have had white children in the regular program and I have had them in the special academics. And I have Negroes in the special academics and in the regular program. So in my school situation it could not be on a racial basis.

Q Now, when you started as an elementary school teacher after integration, what school did you go to?

A I taught first in the Smothers School.

previous school year.

Q That is correct; I am using that definition.

Now, have you ever had an honor curriculum in Maury?

A No, I have not. We have had children who have been considered for honor placement but these children are sent to the Bryan School, where there is an honor class, if the parents wish these children to go to the honor school class. Some do, some do not. Some prefer that their children stay and go along with the classes there at school.

Q Is my understanding correct, that there just is no honor curricula available at your school?

A There are not enough honor children to merit setting up an honors class in my school.

Q When you say not enough children --

A I mean not enough honor students.

Q And who makes the judgment as to the honor students?

A The judgment is made or the recommendation is first made by the classroom teacher. This is followed by my recommendation after observing the child in the classroom situation and studying his previous record, and then the child is tested by the Department of Pupil Appraisal. And on the basis of this complete record, the recommendation is made for the child to be placed in the honors track.

question; just so the record will be straight, we are talking about special academics, are we not, sir?

MR. KUNSTLER: Well, special academics.

THE WITNESS: You are saying then, that a child who is exceptionally good in spelling but poor in math is in a special academic program?

BY MR. KUNSTLER:

Q Well, let's assume -- I am not even saying he is in any program at the moment. But if he was very, very poor in one subject, failing, but very good or normal in another subject, passing --

A Yes.

Q Would you recommend that that child go into a class, a special class, to bring up his spelling, but remain in among the passers, the average group, with reference to his math?

A Only if his teacher in his regular classroom cannot meet his needs and, normally, this can be done. If that child is exceptionally good in spelling, then the amount of help which she needs to give him in spelling can be minimized and then additional help can be given in the math. This is one of the advantages of having a small group with common need. It isn't too likely that at the elementary level children are going to be grouped on the basis of complete weakness in one subject and whatnot in another. Let's look at reading, which might be

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a better gauge than arithmetic. If a child is strong in most of his other subjects and he has a reading weakness, that child would progress with his regular class given additional help in reading. There are reading clinics, reading classes, reading teachers and special reading programs throughout our building. And if we feel that after we have pinpointed his weakness in reading that he still needs additional help that cannot be provided by these other agencies in our school or home with the family, we bring in tutors; and we spell out with the teacher, this is what we want you to work on with him; and we feel we have gotten to the point now, if you work with him twice a week on this he is going to come along and he usually does.

Q Do you find that there are some children whom you personally would consider to be extremely intelligent children who do very poorly on the achievement tests which are administered in your school?

A We have had incidents of this happen. When th is happens there is usually a conference with the teacher and the teacher will spot it almost immediately and say, this doesn't look like this child's performance. And we investigate, the counselor, the teacher and I. We talk about it. And if we feel that this is a poor representation of his performance, we request another testing; and it is given by the counselor; and

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then we can compare the two and see and make adjustments.

Q Let's just look at some of the students who were, say, in your basic or your special academic track as of October, 1965, that would be the last school year. According to our Exhibit B-4, you had, as I have indicated, 15-children in the basic or special academic track. Irrespective of the children who moved out of your school, how many of those children have changed from special academic to --

A Two at the end of last year.

Q That would be two out of the fifty?

A Well, actually, three now, because final results in testing and whatnot on one of the children did not come through until this September. She too has been moved now, so that would make three out of that group from last year.

Q Can you tell over all the years you have been at Maury what the percentage year of the change from special academic or basic, as it was called several years ago, even though that is an archaic term, what the percentage of movement was, so that out of every ten, for example, how many would leave basic?

A Roughly, 10%. We are usually able to take out about two per year.

Q And is that done on the basis of teacher observation or further testing?

A Teacher observation and further testing.

And it isn't a steady move, as I explained to you earlier. It is something that we work into. Sometimes it takes at least two years. This is why in the first year there were none who moved out, because we had not had time to study them carefully.

Q Was your school included in that -- Let me withdraw that. Do you remember that crash program in 1965 to retest a lot of children in the special academic program?

A Yes.

Q Was your school included in any of that retesting?

A We did have a bit of stepup but there was no crash program, because it had been moving along pretty regularly. My counselor has been pretty wonderful about seeing that this testing was done as rapidly as possible. However, we did feel the effect of the crash program in that we did have a team assigned to our building working with us, and there was quite a bit of testing done.

Q Well, were there any changes in classification that occurred because of that additional testing from the special academic track?

A Well, you see, additional testing for us would have been testing children from whom we had submitted 205's. This means placement was pending; placement had not been made. It

was pending. Consequently, the results would show whether these children would go into special academic placement or would return to a slow-moving regular class. So there would be no adjustment within the class itself because they had never been placed in the class.

Q So those children remained in the regular class until you could get around to testing them?

A In the last year particularly, when there -- Well, the understanding is or was that these children would not be placed in this class until such time as it had been determined that this placement was correct. So there were no children in that class who were not placed there by pupil personnel.

Q Do you still find a drag or a time limit in the testing of children today?

A Yes, this does not move as rapidly as we would like for it to.

Q Now, let me go to another subject, Mrs. Posey. Do you have a library at Maury?

A I do this year.

Q This is the first year, is it?

A The first year. It has been a classroom ever since we opened the school.

Q Do you know how many books are in that library?

A I could not tell you exactly. We have a volunteer

librarian. In fact, we have three women come in from the suburbs Monday, Tuesday and Thursday to operate our library for us on a volunteer basis. They were the ones who set the library up during this summer, so I have not had an accurate accounting. Books are coming in every day. Prior to this time we had housed books in a very small room in the building in which the parents had shelves built and piled them on the floor. But we could never get more than a maximum of five children into the room at any time.

Q Now, you have a P.T.A., do you not?

A Yes, we do.

Q Has the P.T.A. contributed any funds towards this library or any other activity of the school?

A Yes.

Q Can you tell me what that was?

A I told you just a moment ago we did have the books coming in and before our allocation was made and the books were coming into the building and we had no place to house the books where the children could have access to them. The P.T.A. took a very tiny room that had formerly been my office when I was in the Maury Annex situation. They put shelves in the room and with bits of tile we were able to beg and borrow we were able to tile the floor and put in a chair and whatnot so that it was a comfortable little room that a person could

principal available tomorrow when Mrs. Posey finishes.

THE COURT: And who would that one be?

MR. REDMON: That would be Nathaniel Dixon. That's the one you knew about.

MR. KUNSTLER: That's the one we knew about.

MR. REDMON: So far as his father, he has improved considerably and he has indicated he would be available. That is one reason we didn't want to call him today, so he could take care of the family situation. So that if I bring him in tomorrow we can see where we are going to go.

THE COURT: I think that is a good idea, and without making any commitments see if that will work out some approach to the others. I do not think that this kind of testimony is necessary to be cumulative, and as I understand the witness' testimony these principals have a great deal of latitude in doing what they choose to do in running their schools, and I do not know that there are inferences that can be drawn from what one or two, or even fifteen of them testified to.

MR. REDMON: Well, of course, that would be one of our points, Your Honor, and that is we have indicated all the way along that there is flexibility even within the three-track curriculum. Now, the other principals will testify, because they have no special classes -- they are all special academic -- and they will testify substantially the same as Mrs. Posey did

with respect to how they are evaluated and the flexibility within the particular curriculum.

THE COURT: Well, I can understand the problem, but we have a deadline here with this witness, and I think I would like to work on this witness as much as possible.

MR. REDMON: Very well, Your Honor.

THE COURT: But I think, counsel, if you would talk to Mr. Redmon and see what you want to do about it. I think it might be useful to have at least another one of them and then make a judgment.

MR. KUNSTLER: I would agree. After Mr. Dixon maybe we can get together and see what we can do.

MR. REDMON: Very well.

MR. CASHMAN: Thank you, Your Honor.

(IN OPEN COURT:)

MR. CASHMAN: Dr. Brain, please.

Whereupon,

DR. GEORGE BERNARD BRAIN

called as a witness by the defendants, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CASHMAN:

Q Dr. Brain, may I have you full name, please?

A George Bernard Brain.

Q Doctor, what is your present employment?

A I am presently Dean of the College of Education, Washington State University, Pullman, Washington.

Q And how long have you been so employed, sir?

A Since January 1, 1965.

Q Dr. Brain, would you indicate to the Court what your employment was prior to your Deanship at Washington State University?

A I was Superintendent of the Schools in Baltimore, Md., from 1959 to 1965. Prior to that I was Superintendent of Schools in Bellevue, Washington, from 1953 to 1959, and from 1950 to 1953 I was in the Bellevue School District as a principal of an elementary school, and then Assistant Superintendent. Previously I was an instructor at Central Washington State College in Ellensburg, Washington, for one year, prior to that two years as a teacher of mathematics and science in the public schools in Yakima, Washington.

Q Bringing yourself then back as far as Yakima, what year would that be, Dr. Brain?

A I began my teaching experience in Yakima in 1946, September.

Q Now, Dr. Brain, how long were you Superintendent of Schools in Baltimore?

A From 1959 to 1965.

Q And, Doctor, when did you acquire your bachelor's degree?

A In 1946.

Q And would you tell me from what school?

A Central Washington State College, Ellensburg, Washington.

Q And did there come a time when you acquired a masters degree?

A Yes, from the same institution in 1949.

Q Now, what was the major field of your study in your acquisition of your masters?

A Educational Administration.

Q And did there come a time when you got a doctorate's degree?

A Yes, 1956, Columbia Teachers College, Columbia University.

Q And what was your doctorate's degree acquired in?

A Educational Administration.

Q Now, Dr. Brain, have you done any additional graduate work at all in addition to what you have already described to the Court?

A Yes, I have participated in graduate courses at several universities -- University of Washington, Washington State University, at Columbia University and at Harvard.

Q And what was the general type of work you were doing at those universities?

A Well, principally these were seminar courses in Educational Administration.

Q Dr. Brain, are you a lecturer at any university at all?

A Well, other than my basic assignment as Dean of the College of Education I do occasionally ^{lecture} ~~lecture~~ at other universities and colleges in my specialized field.

Q And what is that specialized field?

A Educational Administration.

Q Would you list just some of the colleges where you have lectured in this area?

A At Columbia, at the University of Maryland, Harvard University, at the University of Texas.

Q Now, Dr. Brain, did there come a time when you were the President of the American Association of School Administrators?

A Yes, I served as President of the American Association of School Administrators during the 1965-'66 school year.

Q With whom is the American Association of School Administrators associated?

A Well, they are an independent agency. They are housed with the National Education Association.

Q Can you tell us what your duties were in connection

have identified for youngsters from lower socio-economic groups is their inability to handle language and cummication skills effectively, and this means that they can communicate in their own culture but using the formal language which typically is found in the schools has been foreign to their background of experience. Now, the effort here then is made to equip them with opportunities to increase their vocabulary, to improve their ability to communicate, and to use reading materials effectively. Many of them have had limited opportunities for contact with printed materials and there has been typically an absence of good printed materials in the homes of these youngsters, so these are some of the things that would fall into this particular category.

Q Now, Doctor, in terms of your experience in Baltimore, did you notice any tolerance factor in terms of a turnover from, say, a school that was integrated to a school that then would dramatically shift to include mostly Negro children?

A I think our pattern was quite typical of the pattern occurring in many of the cities, and when we reached that point of thirty-five, forty, forty-five per cent in the Negro population of the school that rapidly it became almost completely segregated and totally Negro populated school. This transition would generally take place within a year or slightly longer.

Q Now, Dr. Brain, will you explain how community

education may be used to combat the phenomenon that you have just described?

A Well, we have found that if we could maintain the percentage population of the school at somewhere below 40% Negro that we could offer a quality program of education and at the same time suppress most of the anxieties of the white parents who, when the proportion of youngsters increased beyond the 40% level, would tend to withdraw their children from the school. Now, after the withdrawal began we found then that suddenly it was almost a panic withdrawal and the white families would typically move their youngsters out to the suburban communities. In trying to combat this, developing various types of community informational programs we endeavored to set aside some of the myths that abound in this particular realm of human experience.

Q Would you point up on what you mean by myths that abound?

A Well, there were a number, of course. You must recall that prior to 1954 Baltimore operated as a segregated school system, segregated by law, and in that context there were some members of the families who believed, members of white families who believed that the prevalence of Negro children in proximity to their children in the same school setting would contribute to declining morals and health and in educational standards. This, of course, is not true, and we set about to offset this

prejudice and ignorance by an open educational program and by using statistical evidence wherever we could provide them for that particular purpose.

Q Dr. Brain, you indicated that compensatory education was one of the tools that was being employed and is being employed in terms of combating the difficulties that are being presented by the cities receiving low income children, especially in the center portions of the cities.

How effective a tool is that in combating the problems that do exist by virtue of this on-rush into the center of the city by mostly low socio-economic families?

A Well, it's about the most effective means we have found to date, at least to the educational setting. We have tried many other things and we tried some of these things in concert with leaders of other institutions serving these same people, and find in almost every instance that the added measure of educational effort made through remedial services, exploratory services, innovating practices, and the use of facilities and resources still offers the best hope of resolving the problem.

Q Now, Dr. Brain, did there come a time in Baltimore when an experiment in bussing was conducted?

A Yes, we used bussing for two reasons, one of them to relieve over-crowding in inner-city areas; and two, to make

better use of underutilized facilities in the outer areas of the city and at the same time to provide better opportunities for education for those youngsters who previously had been on part-time or continued on part-time school shifts without the benefit of bussing.

Q Dr. Brain, when was this experiment conducted, sir?

A We operated the program for the first time in 1963. It's continued, I believe, to the present time.

Q And in connection with that, how many schools were involved?

A We had initially seven schools involved, about 5600 pupils and seven schools.

Q And, Doctor, was the result of that experiment reduced to writing?

A Yes. The Board of Education, the Board of School Commissioners in Baltimore asked that when we went into a program of this nature and to have it evaluated after a year of experience with it. An evaluation study was designed according to research standards. It was conducted by a staff member of the Baltimore City schools, Dr. N. Hubert Joplin, and the report was made available to the Board of School Commissioners the following year following the initial experience which this would have been in November of 1964.

MR. CASHMAN: May the report be marked for identification, Your Honor?

THE DEPUTY CLERK: Defendants' Exhibit No. 101,
marked for identification.

(Defendants' Exhibit No.
101 was marked for identifica-
tion.)

BY MR. CASHMAN:

Q Defendants' 101, for identification, which I hand you,
is that the report to which you have made reference?

A Yes, this report was made available to the Board of
School Commissioners and I believe it has been incorporated in
the official minutes of the Board, the official proceedings of
the Board.

MR. CASHMAN: Your Honor, I have merely one copy of
this. It tends to be a little bit faded and I would ask that
at a later time I be given an opportunity to submit a more
legible copy.

THE COURT: Very well.

(The exhibit was handed to plaintiffs' counsel.)

MR. KUNTSLER: Are you waiting for me?

MR. CASHMAN: Yes.

MR. KUNTSLER: If you are going to use it, go ahead.
You are not going to offer it yet?

MR. CASHMAN: Not yet, no.

BY MR. CASHMAN:

Q Dr. Brain, would you describe to the Court what the

main -- well, first of all let me ask you this. Are you familiar with this report?

A Yes, sir.

Q And were you Superintendent of Schools when this report was made?

A I was.

Q And this is an official transcript? It is officially contained, that is, in the minutes of the Baltimore schools?

A I say in the proceedings. The report was separated from the minutes in the official publication, I do believe, but they are all bound together with the report being in the appendix section of the minutes, and they are identified as proceedings of the Board.

Q I see. Now, are you familiar with the main conclusions to which the study comes?

A Yes, sir.

Q Will you kindly describe them to the Court?

A Well, the experiment in bussing initially was intended to be conducted with two or three goals in mind. One of them was to provide an enriched educational experience for the youngsters who remained in the sending schools; two, to provide an opportunity for those whose parents would agree to be transported to a more distant school which was predominantly white, and to be integrated into the classrooms, grades, of the receiving

school; and three, in an attempt and effort to measure the impact and the attitudes of the parents of all three groups of youngsters involved, the attitudes of the teachers in both the sending and receiving school, and the evaluation of the expected achievement of the youngsters in all three school situations. I say three school situations. Actually it involved the seven schools but the three in the sense that there was one group of pupils that remained in the sending school, another group already resident in the receiving school, and the third group was the transported group who were integrated into the classes in the preceding schools.

Q Now, in terms of the measure of educational achievement of those children who were transported as compared with the children who remained in the sending school, did the report come to any conclusion about that?

A We could find no statistical significant difference in the expected levels of achievement of those who were transported. There was no gain in either their ability to read or to handle arithmetical concepts over and above that which had been expected for them.

Q How was this measure achieved with respect to these children?

A Standardized tests were used for this particular purpose, standardized achievement tests.

Q Dr. Brain, was anything at all discovered in connection with the children who remained in the sending school?

A Well, if you recall, I mentioned earlier that part of the design here was to improve the educational resources in the sending school. The educational resources were improved in two ways: one, through lowering the pupil-teacher ratio, and two, by adding the measure of educational support services which had not been present formerly in those schools. In the sending schools with lower class loads and with the added effort of additional educational specialists the achievement levels for these youngsters improved beyond their expected level and over what had been their prior experience for children in those conditions or in those same schools previously.

Q Now, what does this mean to you, Dr. Brain?

A Well, it means basically, I suppose, that the greatest gains in educational achievement, if we are speaking strictly in the academic sense, they are going to be made where we can reduce pupil-teacher ratios and where we can provide added educational services in the areas where the need is a priority consideration.

Q Dr. Brain, could you indicate to me, sir, how old the concept of the neighborhood school is in existence here in the American public school system?

A Well, the neighborhood school concept, I suppose, began

in colonial times. It actually came into being as a form of organization under Horace Mann. He served as the Secretary for the Board of Education of the State of Massachusetts. This was our first public school system. So this was during the 1840's, so at least since 1840 the concept of the neighborhood school has been a part of the structure and organizational arrangement of public schools throughout America.

Q Dr. Brain, would you kindly describe to His Honor the features of the neighborhood school concept that recommend its use?

A Well, the neighborhood school, I think, is a familiar organizational arrangement for anyone who has attended or observed public schools in operation. The school tends to be located in the neighborhood where pupils reside, and is in close enough proximity to their homes so that children can generally walk to and from the school, both at the beginning and close of the school day, and in a number of cases for lunch as well. It is intended to make the school a part of the community and the neighborhood and all the institutions and activities serving the community and the neighborhood, and there are advantages of course from the standpoint of pupil accomplishment, and from the standpoint of home-school relationships, from the standpoint of school activities in the so-called extracurricular category, which helps to build morale and esprit de corps for a

given school. I think its advantages are pretty well documented in the literature.

Q How does the neighborhood school help a child to expand his particular environment, Dr. Brain?

A Well, learning procedures from the individual and his immediate environment to an outward environment which is ever increasing. We start with the home and we then move into the context of the school and those institutions that serve the child in proximity to the home, really formal participatory experiences, and the school is one of those institutions providing participating experiences and involvement of this kind, and its content, the organizational program, particularly in the social realm is constructed in an articulated fashion which takes the child from those things that are immediately familiar to him in his environment and continues to build up a foundation, and this is the logic behind the organization of the neighborhood schools. The logic which follows the basic patterns of learning have been observed by those who work in the behavioral science field.

Q In your experience, Doctor, how widespread is the use of the neighborhood school in American public education?

A Well, I imagine it was patterned, utilized in almost a hundred per cent of the American public school systems.

Q In connection with economy of operation, can you

indicate in that area how the neighborhood school would foster such a purpose?

A Well, the need in there, I mean from the economy point, when viewed from the context of the large city system, is found in the availability of the school in the residence area of the pupils, the schools being located where the pupils live and the need for transportation and that kind of service is obviated, and therefore it becomes economical as a base for operation. Money in school operation is always hard to come by, and the need to keep schools close to the community they serve, the homes within that community, has, I think, prompted the neighborhood school concept, not just in the cities but throughout America, even though in the rural sections of the nation it is necessary to transport children some distances.

Q Is the transportation of children in rural sections of the country comparable at all to situations in the larger urban centers, in your view?

A Well, the transportation is not comparable in the sense that few children in the larger city settings would be transported to and from school. The comparability here would be primarily with children in special educational programs who are handicapped physically and who must be provided with transportation to and from their place of residence, so we have that comparability.

Q Is it correct to say then that the school children who are transported in the rural context don't follow the neighborhood school concept then?

A Not necessarily. If one examines the typical institutions of a neighborhood one would find them prevalent in many of the rural areas. The neighborhood is merely enlarged geographically speaking since the number of people making up the neighborhood are more sparsely settled. The fact that they come from common backgrounds makes the context of the neighborhood applicable on a much larger geographical base.

Q Dr. Brain, you indicated that in connection with acquisition of funds for educational purposes it is generally hard to come by. When you were the Superintendent of Schools in Baltimore what was your pupil population there?

A The population was approximately 180,000 boys and girls in the regular day school program.

Q And in connection with that operation what was your budget in terms of operating costs?

A Approximately eighty million dollars for operating expense.

Q And would you kindly indicate what funding you had for the purposes of capital outlay?

A This would vary from fifteen to thirty-five or forty million dollars annually, depending both on need and availability

of bonding.

Q Would you describe for the Court the neighborhood school concept as it fosters participation by parents to support educational services?

A Well, a good neighborhood school cannot operate independent of the community it serves and the people residing within that community. The success of the neighborhood schools depends to a large degree upon the leadership within the individual school. I am speaking now of the principal and where one finds the principal who recognizes the community value of the neighborhood school, the involvement of parents and other adults residing in the neighborhood school would be at a fairly high level. Wherever this occurs we find that the school is a vital dynamic organization. It is an institution that provides not only education for children but provides understanding for their educational needs and problems to the parents and gives the parents an opportunity to participate in the design of the services intended to fulfill those needs.

Q Dr. Brain, what do you understand by an educational park?

A Well, an educational park would be a comprehensive arrangement of a school or schools serving children at all age levels from the earliest primary grades through the secondary schools, and in some cases beyond the secondary schools for

continuing education, so it would serve all grade levels as well.

Q Dr. Brain, will you indicate the contemplated pupil enrollment at, say, a standard educational park, as you understand it?

A Well, I did a little study for the New York Board of Education on educational parks a few years ago, and in doing this study we were endeavoring to arrive at a point where we could justify the operation of the educational park on an economic and efficient basis as well as providing the necessary educational resources. What we came up with in that study was to operate efficiently and economically we would have to have a pupil population of approximately 18,000 students on a single campus. This was the design, at least, that appeared to be the most workable. This would provide for a high school of approximately 5,000 students, junior high schools of about 6500, and elementary schools of about 6500.

Q Now, what kind of a site, a land site, would be necessary to embrace such an educational park?

A Well, if one employed the criteria for a site selection for a group of this size, as they have been developed by the National Council On Schoolhouse Construction, it would take a site of approximately 160 acres for this large a campus, for this large a park, educational park.

Q Dr. Brain, how many school systems do we have in

the United States, school districts?

A There are about 25,000 operating districts. There are slightly more than that but I think this is the figure generally used at the present time.

Q And of that many school districts how many would be eligible for the use of, say, educational parks?

A I think there are about 151 school systems that operate with more than 18,000 pupils in their total pupil population, so if one used that eighteen thousand figure as a base for an educational park, then there would be about 151 school systems in America that could operate with some degree of efficiency and economy, as well as educational purpose, in the educational park design.

Q In our current school operations -- and I mean this nation-wide -- how many school systems actually now employ the educational park as a device?

A None to my knowledge. There are several that have contemplated the educational park as a feasible arrangement. There are some who would hold that consolidated schools in rural districts operate on the educational park principle, though I would disagree with that point of view since in most of the consolidated districts one finds the high school youngsters segregated from the elementary school youngsters, and at least in the commonly accepted definition of an educational park this would not

be a true application of that principle.

I might add that there are a few districts that are operating educational parks, not by design, but they were created by reason of other conditions at some earlier period in history.

Q And what city would you be referring to in connection with that expression?

A Well, one that I know of that has a few units of this kind would be Detroit, Michigan.

Q And how did they come about it, if you know?

A Well, in Detroit the concept of the educational park came about not because someone was considering educational values to be served by the creation of the larger campus, but rather as an efficiency measure during the depression years. At that time I believe it was the city council who suggested that it would be far more efficient to construct a single heating plant and to group around it four or five or six schools that could use the services of a central heating plant. So there are, I think, a half dozen or more complexes of this nature in the City of Detroit that are operated on this basis.

Q And have you had any estimation of their success educationally?

A I am not in a position personally to speak and attest to their educational value. Dr. Samuel Brownell, the just retired Superintendent of ~~the Detroit~~ Detroit, remarked on many occasions --

THE COURT: Wait just a minute. We do not want any hearsay. If you have any personal experience, well, we will be glad to hear about it, Doctor, but we don't want to get through you what somebody else said.

BY MR. CASHMAN:

Q In considering the educational park, in your opinion, Dr. Brain, would any considerations of discipline come to mind, or disciplinary problems?

A Well, one, of course, is immediately concerned about the welfare of the individual. The larger the school complex the more the individual tends to become lost or loses his personal identity in these large arrangements for the housing and accommodating the children. Some of the efforts to overcome this have been made recently through the school-within-a-school plan and this kind of concept in which youngsters being housed in the larger complex using certain central facilities with all children in common are separated into wings of a building or units of a building for their basic education experiences, but there is always the concern for the individual in the large situation. This would be particularly true for primary and elementary age children going some distance from their home and not being able to meet a bus schedule, a particular schedule for transportation to and from their home. I am sure there would be a few emotional experiences and trying experiences for children

of this nature. The educational park concept has to be a massive operation if it's going to succeed. This becomes a very expensive consideration. I would see it perhaps as a long term measure that might be tested and tried. It's one that offers no immediate solution to the problem if one uses it in terms of a complex, the size requirements for site, where you're going to find adequate facilities for recreation and for those activities wherein youngsters must work off some of the energy they possess, then the site size should be large if it's going to accommodate. It also should be large enough to keep them separated physically so that there can be sharing of central facilities and resources but apart in order to cut down on the hazards to the younger child. We constantly hear now in the large cities, and see evidences of older youngsters abusing younger children in the sense of lunch money and other material possessions that the younger child might carry with him to and from school, and I am sure some of these problems would be of concern to administrators and others with similar responsibilities who would be assigned to the educational park concept.

Q Dr. Brain, would you indicate to the Court what school systems, in your experience, have a compulsory teacher transfer program presently in effect?

A I know of none in large cities that compel teachers to take an assignment under pain of dismissal. I know of several

systems that have voluntary programs, and some which provide for certain kinds of experiences and accept those as prerequisites then for promotional opportunities, but none to my knowledge are operating compulsory staffing assignment pattern.

Q Dr. Brain, when you were the Superintendent of Schools in Baltimore did you have a compulsory teacher transfer program?

A No, we did not.

Q Was it your experience to induce by, say, bonus arrangement, a teacher to transfer into what we have been referring to here as a more difficult teaching situation?

A We considered it. We rejected it as being unworkable. We gave this evaluation of the plan subsequently to a citizens' committee made up of a number of citizens of the city, who were looking at the problem with us, and they also rejected it as being undesirable. It tended, in our judgment, to stigmatize schools. It tended also to create hardship conditions or a recognition of hardship conditions which became undesirable in the eyes of the professional staff members who were searching for their teaching assignments, their work assignments. We found far better arrangements and cooperations in cooperative programs with the teacher training institutions that serviced the city. These were institutions both within and without the geographical limits of the city.

Q Doctor, in your experience and in your opinion, can

Q Are you suggesting that the situation between the gifted child and the disadvantaged child are analagous?

A No. I am saying analagous in the sense that the school's obligation to both is equal.

Q Analagous in that they both create a problem for the school?

A Yes, and the school must adapt itself to those peculiar needs of both kinds of children as well as it must to other kind of children.

Q Now, Dr. Brain, from your experience in your field, do you think that by and large the public schools of the country have done exactly that as far as the disadvantaged child is concerned? Have they fulfilled their obligations?

A Well, I think the recognition of the disadvantaged child is a phenomenon of the present era in education to a far greater degree than it has been at any time in the past, and the reason for this is that it now is recognized not only as an educational problem but as a social problem. It touches almost every avenue of life and every institution that we have to serve the needs of our citizens. And, finally, there is money available for the first time to do some of these things that educators

have recognized for many, many years. Horace Mann in setting up our public school system in America saw education as the great equalizer. And he saw the conditions of poverty and the conditions that abounded even in that era might be that improved, is, the lot of the person coming from that kind of an environment might be improved if he were afforded full educational opportunities.

Q Now, would you say that, as far as you can tell at this moment -- let me withdraw that for a moment.

How do you see the public schools, their role, in connection with the fostering of equal opportunity, for example?

A Well, I see the public schools as really being the hope of every child, the hope of every citizen, that ought to have the heart to reach down to and get into the understandings and misunderstandings of young people and to give them guidance and help and assistance in overcoming whatever handicaps them in their reach toward maturity, toward making them capable to compete effectively for occupational opportunities and to fulfill their obligations and duties and responsibilities as citizens of this country.

Q In other words, to give them an equality of

opportunity as well as equality of education, is that correct?

A That is right.

Q Now, Dr. Brain, you spoke in terms of, I think, the principle of compensation as far as the educational requirements of the disadvantaged are concerned. Could you indicate to me what you meant by compensation?

A Well, compensatory education does not imply, in my definition, any watered down program of education. Rather, it implies and would mean more than just the basic elements of education that commonly would be afforded children coming from average circumstances. It means that because of certain limitations in the environment of the child and the circumstances of the child that the school must take on functions that typically would have been carried on by the home or other institutions in the community; and this means such things as, for example, providing breakfast for a hungry child, because a child who hasn't been fed and who is hungry and who is poorly clothed is not ready for an educational experience. You just don't teach^a/hungry, undernourished, poorly clothed child.

So in this sense the school takes on obligations for children of poverty and of disadvantaged circumstances

where it has been totally unable for the family and the child to provide those particular needs.

Q It wouldn't mean, would it, Doctor, taking disadvantaged children and segregating them from the rest of the school population? ✓

A No, I would think that would be entirely uncommon in the philosophies of American educators, at least, those who I know who work in public schools.

Q Now, in teaching the disadvantaged, or in the education of the disadvantaged, I take it that teachers would have a prime role, would they not?

A Teachers always have a prime role.

Q Would you indicate whether you believe that teachers who teach this type of child should have more special preparation, for example, than a teacher who is not teaching such a group?

A It has been my observation and experience that these teachers don't necessarily require special preparation. ✓ What they need, if there is any way to prepare them for it, is to be equipped by attitude and by heart for the acceptance and understanding of the problems confronting disadvantaged children. I would describe it as a special kind of empathy. They have to reflect the heart and the soul of the school

to find ways to motivate and to encourage youngsters who typically are easily discouraged.

Q What about teacher experience in the disadvantaged community itself, do you think there is any value to that?

A I think that anyone who has an understanding of the problems confronting children who live in these disadvantaged communities will find that they can work effectively, but this is really not different from the knowledge that a good teacher would have in any neighborhood or community school setting. Every teacher who does an adequate job or better of teaching has to understand the community in which he is teaching. This is part of his obligation as a teacher, in seeing what the conditions are that prevail and the kind of problems that confront children in the neighborhood and the community.

It is the kind of thing that good teachers would do in any circumstance.

Q Do you think any sort of in-service training is desirable with reference to teachers who are teaching disadvantaged groups of children?

A I think in-service training is helpful, but I don't think it is going to be the solution of the kind of problem that is confronting us. I think our solution has

to be found primarily in the kind of preparation that we develop in their initial years of experience, and this is not just for teachers of the disadvantaged but for all type of teachers.

Q With particular reference to Negro pupils for the moment, do you think there is any desirability in having, say, integrated faculties teaching as in Washington here in predominantly Negro schools?

A Yes, integrated in the sense of ethnic background but also in the sense of political points of view and religious points of view and people who have breadth of experience in travel and other contacts with the culture. All of these are contributing factors as to what makes a good teacher.

Q But I am particularly concerned now, putting aside all the other aspect of religious points of view and political points of view with what you think of an all Negro faculty for a predominantly Negro school. Would you think that was good or bad educationally?

A Well, I think that it is good, but it is also bad, depending upon the preparation and training of the faculty. I think that we can find just as fine teachers among Negroes as we can among whites or any other ethnic

group. And I think that we have to be concerned not just with the color of their skin but also with the kind of preparation and experience they have had for their assignment.

Q Putting aside that, too, assuming they are of equal merit, do you think there is any integration value, any integration factor, that is important?

A I think undoubtedly there is a value to be found in bringing people together of different ethnic groups and putting them into their roles as teachers where youngsters have an opportunity to identify with different models and different images and learn different points of view, depending upon the background of the people who would be instructing.

Q Do you think it is good educationally?

A Yes, I would say it is good educationally.

Q Conversely, from your own experience in Baltimore, do you think there is any detriment to Negro pupils, assuming all the teachers to be of equal caliber, that they have only Negro teachers in their school?

A No, not necessarily. I think there can be just as good models here as well as you can find anywhere. I think the detriment would be found in terms of the other contacts

which Negro children would have; if they are restricted totally to a Negro environment, then I think they are undoubtedly going to be missing a part of their developmental process by not having had contact with people from other ethnic groups.

Q What about the other way around, Doctor? Take a predominantly white school which would have, say, an almost all white faculty or an all white faculty?

A The same condition would prevail here.

Q You would think it would be educationally good for the white children to have an integrated faculty?

A Yes.

Q Now, Dr. Brain, with reference to the big city school populations that we have been discussing -- and by the way, before we leave the teachers, I want to pick up on one point that Mr. Cashman brought out. He indicated or asked you a question about compulsory transfer of teachers, and you indicated that, I think, Baltimore did not have such a system of compulsory transfer. I wanted to ask you whether you are familiar with the fact that -- you are familiar with the Montgomery County school system, are you not?

A Yes, in general.

Q And I think you know Mr. Elseroad?

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teacher dislikes or would judge not to be to her liking, but I think to compel the teacher to accept assignment under pain of nonemployment or dismissal would be a bit foolish and a little shortsighted, because the teacher undoubtedly in a number of cases would withdraw and find a teacher assignment somewhere else in some other school jurisdiction. ✓

Q You had the power, did you not, as Superintendent of Schools in Baltimore, to assign or transfer teachers where you wished?

A This is correct.

Q Now, if you had a situation where the only way to get any sort of an integrated faculty would be for compulsory assignment or transfer, is it your testimony that you would not employ this device?

A I don't think I would find myself in that situation as a school administrator. I think that there are other devices and other means that can be employed beyond compulsory assignment to accomplish the same end, and I think in the long run they would be far more productive than merely compelling teachers to take a given assignment.

Q What are those means?

A Those means are very simple. They are appealing to the teacher body as a whole to come forth and to accept a professional obligation which is recognized today as a

very serious obligation.

There is also the approach that can be made to their organizations and their associations to enlist their support as agencies involved with their membership in combatting a problem of this particular kind.

There also is the possibility of approaching teachers' colleges, those who are preparing the teachers, to enter into an internship arrangement whereby the teacher in training spends part of his day or part of his year in one of these schools, with the understanding that if the person completes his educational preparation and accepts employment in this community that certain emoluments can accrue to him.

There are a number of techniques of this kind that can be employed effectively.

The problem today is not just finding teachers for intercity schools. The problem today is finding sufficient number of qualified teachers, period. ✓

The problem confronting our Nation's school systems is a tremendous problem. This fall the Chicago school system opened with more than five hundred teacher vacancies in its qualified teaching corps. I think the Baltimore schools opened similarly with a shortage of better

than a hundred qualified teachers for staffing its positions, and all of these assignments that were going begging were not just intercity schools.

Q But I take it, getting back to the problem you and I were discussing, and putting aside for a moment this national problem of teacher shortages, I take it from your answer that you feel that there is an obligation on the school system itself through education or orientation of its teaching staff to try to make the teacher see that there is an obligation to move around, as we have indicated, in order to integrate faculties and to do that through education rather than compulsion?

A I do.

Q Now I take it as an educator that you yourself believe that segregation by race in the school system is inherently unequal, is that correct?

MR. CASHMAN: Your Honor, that calls for a legal conclusion on the part of the witness.

MR. KUNSTLER: No, it is not a legal conclusion, Your Honor. Whether education is unequal or not I think can be an educator's conclusion as well.

THE COURT: I will overrule the objection. I think that this witness is an expert in the field. So let

Q However, in Baltimore when you began your bussing program you apparently thought that there was some advantage, in some instances, to going outside the neighborhood school area and taking the children by bus to schools more distant than the neighborhood school, isn't that correct?

A Yes. The advantage that we wought was primarily an opportunity for a full school day as opposed to a part-time school day.

Q Was that your only consideration?

A That was the major consideration.

Q Was integration any factor in that decision?

A Integration was a factor only in terms of the receiving schools; and, that is, we concluded at the outset that we would not keep children in their separate class groupings when they were to be housed in a receiving school, but rather they would be integrated with the existing classrooms of the receiving school.

Q Now you found in your analysis of the development of the children both at the receiving and the sending schools, as I understood it, that, as far as the sending schools were concerned, the lowering of classroom population resulted in an increase in achievement, is that correct?

A That is correct.

Q Now, you also found, as I understand, that in the receiving school the achievement stayed about the same, is that correct?

A There was no significant gain.

Q No significant gain. I assume you did this by using the standardized achievement test?

A And statistical correlations.

Q When you say statistical correlations, you mean between IQ and achievement?

A No, between expected levels of achievement and actual levels of achievement.

Q And can you tell the Court how those expected levels were arrived at?

A Well, the expected levels were based upon the norms for the group and for several preceding years. So that we had a pattern established for both the sending children and the receiving children in their separate school environment; and we compared the extension, the extrapolation of that norm with the actual for the period during which they were being transported.

Q When did you conduct these tests?

A We conducted a pretest before they completed their prior year of experience in May and June of the

prior year. We conducted an initial test in the September and October period of their beginning year, and we conducted a concluding test at the end of that year of experience in May and June.

Q When did you first see the improvement, in general? As far as the sending school was concerned?

A The improvement in the sending schools was noticeable in the October tests.

Q Now, as far as the receiving schools were concerned, you say there was no significant change. Was there any change?

A Well, there was a change downward.

Q Downward on the part of which students?

A On the transported students.

Q The transported students. Did you test the students who were already in the receiving school?

A Yes, sir.

Q And what was the result there?

A No appreciable change.

Q Now, that was during the first year of the transfer. What about the second year?

A The longitudinal studies are still in progress.
as
The longitudinal studies, I know them, support the conclusions

THE COURT: We may as well tell the Doctor what they are. Those are 22 areas in the District of Columbia, in each of which area the elementary schools are handled on a unitary basis as far as boundaries are concerned. In other words, the elementary schools in each one of those areas, the boundaries of those schools do not go outside the boundary of the area.

Do you follow me, Doctor?

THE WITNESS: You mean that a child residing, for example, in School Boundary 22 may not attend School No. 21?

THE COURT: That is correct. In other words, each one of those areas for school boundary purposes is a unitary area for elementary schools, even though there may be in each area several elementary schools.

BY MR. KUNSTLER:

Q And then I would call to your attention, Doctor, to break it down further, that the elementary schools themselves have their own boundaries within the gross boundary.

THE COURT: That is right.

BY MR. KUNSTLER:

Q And then my question is whether if these

attendance district boundaries contributed to a de facto segregation or caused it, would you say there was any obligation on a school administrator's part to change those boundaries?

THE COURT: Wait just a moment.

MR. CASHMAN: Your Honor, again, I want to know whether or not we are referring to any legal obligation or whether--

MR. KUNSTLER: Educational.

MR. CASHMAN: --we are referring to an educational obligation.

MR. KUNSTLER: Educational obligation.

THE WITNESS: I think if you were to take an eraser and wipe the map clean of all boundaries that the problem would still exist. We did just that in Baltimore. We eliminated all school district boundaries and opened with a free choice of schools.

We found that in a city with a population, school population of 130,000 or better youngsters that fewer than 600 youngsters sought to move from one school to another after we had eliminated the boundaries.

So the existence of boundaries sometimes is looked upon as a barrier to the free movement of pupils from one

school attendance area to another; but even when those boundaries are eliminated and no longer is there a policy barrier, the experience that we had in Baltimore would indicate that few, if any, would take advantage of this.

Q I am talking about the following situation, not eliminating boundaries at all, but where you have white and Negro neighborhoods next to each other. I ask you whether you think it would be good educationally where it could be done.

A Yes, it would be good educationally to bring the youngsters together wherever it would be possible.

Q Did you find in your 600--

THE COURT: Wait just a moment. Did you have something else to say?

THE WITNESS: I want to say where you compel youngsters to attend a school different from the one they have been typically attending you are going to suffer an educational loss, I think, as the evidence would indicate, simply because of the emotional problems that sometimes attend a situation of that kind.

BY MR. KUNSTLER:

Q Would that be an initial loss or a permanent loss?

would be in a better position to care for the child after school hours than would be the circumstance at home where the mother oftentimes would be working and there would be no one at home to receive the child when he returned home from school. These were typically reasons given for most of the cross city transfers.

Q Could you suggest a way, Dr. Brain, with reference to a school population like Baltimore by which administrators could achieve what we call the integration factor in the line of what we are talking about, boundaries or elimination of boundaries?

A Well, I don't think that you can employ a simple technique to achieve this. There are no simple techniques that will work. I think there has to be a combination of many things applied. Many things in some cases would include bussing and in others pairing of schools, in others it would include use of the so-called Princeton plan or modifications of it. There are numerous techniques that can be employed; but if one is going to be interested really in doing this for the long term, I think it can only be achieved through a massive infusion of funds to support the resources. You have to improve quality; and if we can't improve the quality, almost any other solution is a temporary

solution to relieve emotions and anxieties while the slower and longer term application of modified programs can take effect.

Q But all I am trying to find out, there are some interim methods that can be used short of the eventual millenium of getting all the funds that are required.

A I think there is an obligation here to do everything that can be done that is educationally feasible to improve learning opportunities for children.

Q Doctor, I notice if you will look at page 35 of the W-3, No. 6 states, and I will ask if this is your opinion as well:

"Interracial experience should be provided even in places where the population of an entire school district of is/one race."

Would that be your opinion as well?

A Yes. This district, however, in this statement refers to one of these zoned areas that you have identified to me here as the pattern in Washington. It doesn't refer necessarily to the Washington District, for example, and the Baltimore district as two separate entities.

Q You mean to other school districts?

A That is correct.

another way, I would like to ask you whether the statement here subscribes to your view at this moment or you subscribe to the statement.

"School staffs should be racially integrated. The principles which apply to school population apply also to school staffs. Racial separation of faculties creates the same problems as racial separation of pupils, and desegregation of school staffs offers the same advantages as desegregation of pupils. It provides pupils with examples of good relations between the races and of equal status of the races and helps to counteract or prevent stereotyping. All teachers should be selected and assigned on identical standards, irrespective of race. To effectuate this policy implies upgrading of teachers whose own educational background may be less than adequate, and the needed training should be provided at public expense."

Would that be your view today?

A Very definitely.

Q Now, as far as educational parks are concerned, are you familiar at all with Dr. Wolff's study in the New York City school system?

A Yes.

Q That is Dr. Max Wolff, is that correct?

A Yes, sir.

Q And can you tell the Court whether he has made a substantial study of the value and utility of the educational park system?

A Well, Dr. Wolff and I disagree in part on the general design and the operational program for educational parks.

Q Dr. Brain, I don't want to interrupt. I am just asking you the question, Are you familiar with the fact that he has made such a study?

A Yes.

Q Now, as far as disagreement goes, if you want to explain that, you are perfectly free to do so.

A Well, I did not want to take the Court's time unnecessarily.

THE COURT: Go right ahead, sir.

THE WITNESS: The concept of the educational park is one, as I indicated at the outset, which has to be developed on a massive basis. It isn't going to be successful as any limited operation involving only a few pupils. And as you increase the massiveness of the school plant, you also decrease the holding power of the school. Consequently, one can anticipate a greater number of

dropouts from the educational park than from the traditionally organized secondary schools. Dr. Wolff ignores this aspect completely in his design of the educational park. And I think this is a very fundamental consideration in offering an educational program.

I think we have to be very cautious and very much aware of those conditions that create school dropouts, and we ought not by design contribute through the organization structure and facilities to the dropout problem further.

Q Dr. Wolff comes to a different conclusion, does he not, as far as the feasibility is concerned?

A Yes.

Q Dr. Wolff also concentrates on the fact that the educational parks would relieve de facto segregation, does he not?

A Primarily, but he ignores completely the financing problem and the standards that ought to undergird any program of this kind; and, therefore, idealistically, if one subscribes completely to idealism, then his plan might be effective.

On the other hand, looking at the practical problems involved in site acquisition, in site development, in construction, and the knowledge required and amounts of

money necessary for programs of this nature, we recognize at the outset that compromises are going to have to be made; and as soon as compromises are made, the idealism is somewhat destroyed.

Therefore, we may be creating more problems than we are resolving in an attempt to solve this de facto problem solely through the educational park concept.

Q It is true, though, is it not, Dr. Brain, although the initial outlet for educational parks is as, you have stated, high that in the longrun, according to Dr. Wolff, anyway, they become more economical to operate?

A Not necessarily. This is where he and I will disagree again. The experience of the Detroit City system whose maintenance and operations budgets I have examined would indicate that only school settings and complexes which can be likened to the educational park created because of the desire to economize on heating plants back in depression years, that the operational costs of those plants are excessive, the reasons for this being that they are subject to far greater vandalism and far greater abuse from the heavier use of certain common facilities than would be the separate school facilities.

Q You are familiar, are you not, Dr. Brain, I

believe in your direct testimony you indicated this, that there are many central and consolidated school districts?

A Yes. Here we are talking about fewer than 5,000 pupils; and in the educational park concept, we are not talking about 5,000 pupils.

Q I understand they serve a smaller area.

A Yes. Even there in the consolidated districts, you will find that the secondary area schools are separated from the elementary schools; and in many cases separated also from, the senior high schools are separated from the junior high schools.

So even in the consolidated situation, we operate about 22,000 consolidated districts in this country; and among the 22,000 consolidated districts, about 90 percent of these do not have a common campus. They have separate campus facilities.

Q That is right. And what I am referring you to is this: Are there not some proponents of the educational park program who do plan and have exhibited such plans to have a separate elementary school and a separate high school and a separate junior high school, and that where the facilities are mutual, they are in the area of cafeterias, libraries, and gymnasiums?

A I haven't made myself clear or you misunderstand.

Q The latter is probably true.

A Not necessarily. In these consolidated districts the campuses are separated, not at opposite ends of a study, but are completely, but are physically separated in many cases by miles. In the consolidated number that I have described, at least, we are not talking about locating elementary and junior and senior high schools even in consolidated districts on a single site.

Q Are you familiar with the Fox Lane complex in Westchester County, for example?

A Yes, but that would be unusual among the consolidated districts.

Q But it is possible to have an educational park with the various schools separated from each other not by miles but by hundreds of yards?

A Oh, yes.

Q And if that were so that would preserve, would it not, the factor you thought would be missing in one building concept, that would preserve some of the school spirit.

A As you increase the size of the school plant you lessen the opportunities for student participation and involvement in those activities that contribute to high

morale and esprit de corps and that motivates youngsters to want to remain and stay in school. This is one of the problems that we have not resolved in our larger school systems or even in those high schools, large high schools, whether in city or suburban areas. There would be fewer opportunities to participate in so-called activities in the school, whether curricular, co-curricular or extra-curricular, this participation is vital as well as high quality in educational programming to get youngsters to remain in school.

Q As I understand Dr. Wolff's recommendations, it isn't necessary to him to have a mammoth elementary school. As I understand it, he proposes quite a few elementary schools in the complex and each would be of a manageable size.

A Yes, but recall I mentioned that I felt that Dr. Wolff had ignored the question really of site acquisition. If he wants to stay with the standards of the National Council on School House Construction, if he can assure us, then I am with him one hundred percent in terms of size. But, realistically, this just isn't possible in our cities.

Let us look at Washington. If we were to take a group of district pupils here into complexes of ten,

fifteen thousand and provide the site for this particular purpose let us say that the National Council has suggested as the desirable standard, we just don't have enough geography, we don't have enough land area in the city to accommodate all of these complexes. We would have to create or rebuild the city for this particular purpose.

Q Or go outside the city?

A This would be a possibility if you changed the political structure.

Q On your subject of vandalism, this would not be a pertinent objection, would it, Doctor, if you had the smaller schools? You were thinking of one large school, isn't that correct?

A Yes. But you will find vandalism, of course, affecting smaller school units as well.

Q But you find that with or without educational parks, isn't that correct?

A Yes, sir.

Q Dr. Brain, I want to read you a paragraph on page 34. You will find that on page 817 of the large pagination, but it is your page 34. It is paragraph 3, and I will read it to you and ask you if you subscribe to these views today.

in an all-Negro faculty teaching all-Negro children in their immediate environment which happens to be the ghetto situation.

Q Then I take it that you saw nothing wrong in segregation as such?

A I don't think it is the most desirable thing. I think it is very undesirable and I feel that when we can integrate communities in a wholesome environment where these children are living together in this type of environment, that an integrated school is going to be a natural situation for these children and will be accepted as such.

This is the ultimate. This is the thing we greatly desire, but I cannot say that because we have not reached the goal at this time that I condemn the situation we find ourselves in.

Q Do you think it is more important, for example, that a Negro child in an all-Negro school such as we described -- it is more important for him to see an elephant than a white face?

A He sees white faces.

Q Where?

A In his neighborhood, in our school situation. There are people who work with him daily who are white.

Q Who does he see in your school?

A He sees a white doctor. He sees the white nurse. He

sees white tutorers who come. He sees the white librarians and white librarian aides.

He sees special teachers who come to the building to teach music and other subjects. The orchestra teacher is a white teacher. So there are white people coming and going constantly.

There are the volunteers who work in the building on special projects who are white.

So you see he is exposed to white faces and there are white people in his neighborhood.

Q These are the sporadic contacts, aren't they?

A These are regular contacts. They are not sporadic, and--

Q He sees the doctor every day?

THE COURT: Let her finish.

MR. KUNSTLER: Pardon me.

THE WITNESS: There is the doctor every Wednesday on a regular schedule.

The nurse is scheduled for visits or is in her office on Wednesday, but she is in and out of the building and she is in and out of their homes all during the week on visits.

The librarian is there on Monday, Wednesday, Thursday. The tutorers come every Tuesday.

The other counselor aides who are there or on call.

The orchestra teacher comes every Wednesday.

The French teacher who is white comes every day.

There are many others.

There isn't a day that passes that there isn't contact with white people. t

Q These people that come -- these are people that come to the school, aren't they?

A Yes.

Q They are not there permanently?

A They come in and out of the school

They have had white teachers on the faculty. You questioned me about my faculty this year.

I do not have a white teacher this year. I have had white teachers on the faculty in past years.

Q How many have you had?

A There was a white teacher on the faculty last year and I think I made it clear, or if I didn't maybe I should at this point, that when I had a choice of choosing teachers, I just found that this teacher was not the most desirable for the particular class I wanted and I chose a Negro teacher rather than the white teacher.

She is still teaching, however, in a Negro school.

I had another white teacher the year before when I

spoke of the swing shift kindergarten.

It was a Negro and white teacher combination who operated a three-class swing shift.

Q What happened to her?

A She had transferred. She asked to be moved nearer her home. She was living in Georgetown. Her husband was in the medical school there and they had the one car. It was a transportation problem for her.

Then --

Q Well.--

A Excuse me.

Q Go ahead.

A I had had her the year prior to that as an intern. She did her internship or practice teaching, if you call it that, at the Maury School, and at the conclusion of her internship, she asked if she might be placed at the Maury School.

She also worked two summers at the Maury School. In fact, she came back and did some school work there last summer on the head start program.

She worked very closely with parents. In fact, I think she -- I know she used the members of our community for her work on her Master's thesis.

Q Let me ask you this:

How many white teachers in the seven years you have been at the Maury School have been sent to the school for you to look over?

A Not sent to the school for me to look over. They have been appointed there.

Q How many?

A It isn't a question of my looking them over, but they are appointed and if I don't find them satisfactory then, of course, I can ask that they leave the school.

I think there have been three.

Q Have you ever asked for any more than that?

A I don't specify teachers according to race. I ask for a teacher for a grade and if there are special abilities that are needed to be attended to, I ask for a teacher with this ability and then teachers are sent to take care of the situation.

But it isn't a question of race with me.

Q You have no complaints against the Board of Education on the placement of teachers at all, do you?

A The teachers are placed in the school. I have the privilege of deciding whether or not they are good teachers and of course I don't decide whether the teacher is a master teacher in her first year, but whether or not there is potential that I can develop with this teacher, or if I feel that this teacher

is unsuited for the particular class situation that is available to her, that is, if I don't think kindergarten is her best field, but maybe a higher grade, because of her relationship with children, I recommend that she be given a higher grade and that she go on.

These recommendations that I make for teachers that I have received -- and I have recommended that teachers not be rehired -- I have done this on the occasion of two teachers last year, because of their inability to meet the needs of the children -- but this is never done on the basis of race or what have you. It is done on the basis of whether or not a teacher has proven her ability as a teacher in the classroom.

There is my function in deciding or in helping as far as placement of a teacher is concerned.

I don't think I can judge a teacher's teaching ability simply by having an interview with her. I have to see her in the situation.

I have to offer her all the resources available to give her help.

Then if she doesn't prove satisfactory, and after I have observed her in the manner I described to you yesterday, then I make the recommendation that this teacher be changed or that this teacher be given help.

Now, there are two teachers that I asked not to be hired for this year who have been offered internships. They came from out of state. They were not acquainted with our methods of teaching and I recommended for them internships.

This means that for a while they work under a master teacher and learn the techniques and the ways of teaching as we here in the District know them according to our planned curriculum.

If they prove themselves successful in this, then, of course, they will be rehired.

Q I see.

Now, do you think, Mrs. Posey, with reference to Negro children that you have known in the District, that it is extremely important for those children to have some sort of a program of self improvement?

A Yes, I think this is important for all children depending upon what that manner of improvement is. The needs are different.

Q Well, do you think it is more important for Negro children out of the ghetto than for other children?

A I would not be able to judge that absolutely unless I have known numbers of other children in the same kind of classroom situation, but I know that when children come to us

and do not have the same standards that we desire, then it is necessary to develop these standards, yes.

Q Who sets the standards you desire for them?

A The children along with the faculty along with the members of the community.

Q Well, I am just trying to find out how you as a school principal with these children arrive at the standards which you think these children should achieve.

A These standards, if you are referring to the Maury Code that you have in your hand, were arrived at with the children.

We, in my assemblies which are held on Friday mornings, discuss the things that we ourselves notice. By we, I mean the children with me in front of the class, or taught him as a teacher, if you wish -- we discussed the kinds of things that we found undesirable in our school.

The children pointed these things out and then we decide that we are going to do something about it and they go back to their classroom and they talk about the things that are desirable and what they feel we might do about these things.

The teachers are working in this program with them and a Code of Ethics Committee receives all of these responses and then the faculty sits down and plans again what we go back

to with the children.

I sit in on these meetings and I know what to say to the children when I meet them again.

This was a matter of over a year's work before we came up with this and , of course, when the children presented it, it isn't worded quite this way. It is rather long and in their expressions.

Then it goes back for refinement. This is a language lesson. It goes back for refinement and at the end of the year we came up with this. It was presented at a PTA meeting, the parents had a chance to hear it, to discuss it, and in full agreement, parents, teachers and children, this was the code that we set up.

Q When you say that the children had a hand in this, did the children say, for example, that they would only wear heavy jackets out of doors only?

A Exactly.

Q Did they say that?

A Not possibly in those exact terms. The children's idea or complaint would have come in the form of the fact that we shouldn't wear heavy clothes or we shouldn't wear outer garments or we shouldn't wear sweaters and we shouldn't wear jackets and we shouldn't wear many other things, they would

probably say, in the classroom, but then in the refinement process the teacher is going to say: What term might we use that would take care of all these sweaters and coats, etc., and this is the term that comes up in the expression and its wording in this manner.

Q Mrs. Posey, do you know what the term Negro stereotype means?

A I probably have my own concept of it, yes.

Q What is your concept of it?

A Negro stereotype is the idea that people have of what a typical Negro might be and this idea has probably been perpetuated.

Q Are some of those things in the stereotype that Negroes are dirty, that they steal, are those two of the aspects that --

A I have heard it said, yes.

Q Isn't it true, Mrs. Posey, that your Code of Ethics -- I show you 97 --

A Yes.

Q Is merely an approach to combating what you feel is the Negro stereotype?

A No, I don't feel this. I repeat to you that these were problems that were identified as problems of a classroom

and I don't think you can possibly go to any classroom anywhere among any group of children that some of these very things would not appear.

I don't think that you can go to many classrooms that you won't find children chewing.

I have visited classrooms throughout the Washington area. I have visited classrooms in other cities and it isn't unusual to find children chewing in class.

It isn't unusual to find someone with a bit of cookie under a desk.

It isn't unusual to find a child copying probably from another paper or from a source from which he shouldn't copy.

It isn't unusual to find a child who under the pressure of being caught in a situation might not try to find the untruthful way out of that situation.

So I don't feel that this is the stereotype Negro at all. These are situations that do arise that any parent, that any teacher would want to train children not to perpetuate in their lives.

Q Let's take one of the examples.

You say there you should not steal, for example.

A Yes.

Q How many cases of theft did you have between pupils, last year, for example?

A I am certain that I -- none of the teachers keep a record of who steals or theft, as you call it, in the classroom, but theft could mean anywhere from taking a pencil that didn't belong to you to taking a jacket that didn't belong to you.

It depends on the situation and we certainly don't keep records of these things, but when they occur we certainly try to do something about it. We don't turn our faces away.

Q Well, did the children suggest to you to put it in your Code of Ethics, the phrase: We shouldn't steal?

A Yes.

Q They said that?

A This is part of the Code because the children are very concerned about a pencil that is lost or taken.

A pencil or a book taken in a classroom can disrupt a classroom for a whole day.

Q Well, did you have many -- if you know -- let me withdraw that.

Would these thefts be reported to you?

A Not always, no. They are most often settled in the classroom with the teacher.

Q Do you know whether theft was very prevalent last year

in Maury School?

A It was not prevalent to the point that it was a major concern, that I had to be concerned or do anything about, because it is part of our teaching that we don't do this and it isn't a major problem, no.

Q Well, you have in there: We shall keep our bodies clean.

A Yes.

Q Let me ask you this:

From your own inspection of these children when they came to school, did you find the children were very dirty children?

A Not always. There are isolated cases, but have you opened any health book at our elementary grade level and there are major sections devoted to cleanliness and the care of the body.

Q I understand this, but this is a Code of Ethics.

A Yes.

Q Interposed by the school. This is something the children must live by.

A Yes.

Q Outside of their textbooks.

A Right.

Q And you felt it necessary to particularly point out --

A Exactly.

Q -- in some way that they should be clean children.

A This is right, and I feel that this is absolutely necessary.

There are cases and I won't say isolated to the point that there are one or two -- there are several children in the building that we have to take very special care of as far as cleanliness goes.

They have to be taught because it is not a situation at home and in visiting the home, when I find that there may be four families using one bathroom in the morning to get the families out, I have to sit down with the mother probably and help her understand that maybe if she can just get the hot water and have it available, you can have the children take a sponge bath in your own quarters rather than wait to get to the bathroom and probably not get there.

These are facts, counselor. These are facts that we live with and it is important that it be included in our training for our children.

Q Isn't it true, Mrs. Posey, from your own experience with Negro children, that in the great, great main they come to school neat and clean?

A Yes, on the whole they do, in some areas. In some areas they do not.

Q Take Maury.

A In Maury School cleanliness for a while had been a problem and I repeat, it is a problem now.

It is not unusual for me to meet members of a certain family in my building, in the hall, and take them by the hand and carry them down the stairs to the clothing room and put on them the proper clothing that they need for the day.

Q When a child comes to school, for instance, with a striped -- what we call a T-shirt for an undershirt protruding under a partial jumper for a dress, and this T-shirt is unclean, is serving as an undershirt, with odd socks or maybe no socks, or shoes without shoe laces, I do not consider that child properly dressed for school and that little child is going to be hurt possibly during the day by someone maybe just looking at her.

She is not going to be in the proper frame of mind for learning because she recognizes that she is not properly attired for school.

She has but to look at the other little children in the room to know this.

And rather than have her experience this, if I can

avoid it, we take her to the clothing room and she is properly dressed.

Q And from reading your clothing directives, you have almost what amounts to a uniform, do you not?

A Heavens, no. I wouldn't consider that a uniform.

Q Well, all the boys must wear sweaters over shirts, right?

A Wear sweaters over --

Q Shirts.

A Yes.

Q And all the girls must wear dresses and skirts, is that correct?

A Well, what else would a girl wear?

Q I will go on with it; we will go through them.

You have the boys -- let's go down from the top.

The boys wear ties with dress shirts.

A With dress shirts, yes.

I think it is most inappropriate for our boys to learn -- that they wear button down dress shirts hanging open -- this is very wrong and they should learn from the beginning that they wear ties.

If they do not wish to wear ties, they can wear sport shirts which are appropriate to be worn open.

Q As defined in the District of Columbia School System. Certain children, because of the teacher's evaluation and IQ and principal evaluation are put into certain curricula which are different than those which, the normal run of children, which we call special academic?

A I think I would redirect that emphasis not on the teacher and the principal's judgment as much as on the needs of the children.

I feel that if children have special needs that must be taken care of then, yes, they certainly should have special education to take care of their problem.

Q And the determination of those needs are by teacher evaluation?

A Yes.

Q Intelligence tests, if you have the results of intelligence tests?

A Testing by the Department of Pupil Personnel and there are many tests administered.

Q Well, let's take the intelligence test itself.

Is there any particular figure on the scale which would indicate that he ought to be considered for special academic?

A There is a range at which the child is considered performing below the normal range.

Q What is that?

A 70 is usually the cut-off point, performing that particular scale of 70.

Q Below 70?

A Yes.

Q And then you have the principal evaluation?

A Yes.

Q Is that correct?

What about achievement test scores? Do they enter into it?

A These are sometimes considered if achievement tests have been administered at that time.

Q And then I take it the principal has an evaluation?

A Yes.

Q Is that correct?

Now, what evaluation do you get from Pupil Personnel?

A Pupil Personnel sends in a school psychologist who gives a complete testing of the child.

Now this includes many, many forms of tests that she feels would give her the picture of the child's ability to perform.

Q Have you looked at some of these tests yourself?

A I have not studied the tests, no. I have studied

the results of the tests.

Q Now, you indicated that some of your children have, for example, language barriers.

A Yes.

Q Coming into your school.

A Yes.

Q Have you ever thought of the language barrier as also being a barrier to the test itself, the taking of the written test, the verbal test?

A Well, I don't think so because I think all of this is given consideration at the time the psychologist works with the child.

Now, I would ask -- not being a psychologist, I could not very well judge what value she gives to that particular phase of the test.

Q Don't you speak to the psychologist?

MR. REDMON: Your Honor, I believe this examination is now going outside the scope of the direct examination. The testimony has been that the Pupil Personnel Services are the people who make the evaluation on the tests that they give.

Now, Mrs. Posey has not testified concerning any knowledge of these particular tests and well she shouldn't

question.

THE WITNESS: Yes.

THE COURT: Do you know the difference between mental retardation from brain damage and mental retardation from social problems?

THE WITNESS: I think I do.

THE COURT: You do?

Now, in the 70 cut-off that you have just given us for the IQ, does that 70 involve children with physical brain damage as well as social retardation?

THE WITNESS: It could be either, but you see, Your Honor, this 70 or so is only an indicator that this child is functioning within this range.

THE COURT: I understand.

THE WITNESS: Then we go further to determine why.

For instance, a child with that 70 at the time of that testing who has socio-economic retardation rather than a brain damage type of retardation can then be given the kind of experience, the kind of specialized education that will bring about the improvement necessary.

This is then when we request another testing to see if there is a change and quite often we do find a change as much as of ten points at the next testing and the child moves on from

there.

So that IQ is only an indicator. It is not a definite factor.

THE COURT: My point is this: In determining whether or not a child goes into the special academic class, is the type of retardation considered, whether it be brain damage or social?

THE WITNESS: Yes, I think in the testing by Pupil Personnel this becomes very clearly evident, that there is much more than just academic retardation.

Quite often the recommendation made by Pupil Personnel is that the child be placed in a slow-moving regular class, recognizing that this retardation is an academic one and not one of brain damage or something else.

Now when there is a belief that there is a greater problem then the child is placed in special academic and other testing proceeds from there until the child gets the proper placement which sometimes results in SMR class, or severely mentally retarded which is the result of brain damage.

THE COURT: How can you tell the difference between brain damage retardation and socio-economic retardation?

THE WITNESS: I can't. I have to rely upon the experts.

THE COURT: What is the range -- below 70 is the moron range, isn't it?

THE WITNESS: When it gets down into that range, yes.

THE COURT: From 50 to 70 I understand is moron.

THE WITNESS: This is true.

THE COURT: Is that right?

THE WITNESS: Yes.

THE COURT: Are these children with this socio-economic retardation candidates for the special academic -- assuming the other tests work out -- because their IQ runs below 70?

THE WITNESS: Please repeat that.

THE COURT: I say, children with the socio-economic retardation are candidates for special academic if their IQ tests run below 70.

Is that true?

THE WITNESS: Well, actually the cut-off point would be 75. We think in terms of the range of 70 to 75.

They would be candidates for this class but they would certainly receive a different type of attention if we find that they are academically retarded rather than mental or brain damage --

THE COURT: The real point I am trying to get to is this:

It is inconceivable to me that children suffering retardation from brain damage, which is irreversible -- well, anybody will tell you it is irreversible -- it is brain damage -- are put in the same class with children who don't suffer in the same way.

THE WITNESS: You misunderstood me, Your Honor. They are recommended for SMR, severely mentally retarded.

THE COURT: Well, you --

THE WITNESS: There is another class for these children.

THE COURT: Just because the child has brain damage that doesn't mean she is severely mentally retarded.

THE WITNESS: This is a distinction between the special academic which meets the needs of the academically retarded, and those who have mental retardation or brain damage retardation.

THE COURT: You mean there is a separate special academic class for them?

THE WITNESS: There is a class for these children and --

THE COURT: Would you answer my question?

THE WITNESS: Yes, there is a special class for children with brain damage.

THE COURT: Not the special academic?

THE WITNESS: Separate from special academic, Your Honor, yes.

THE COURT: Where is that, in your school?

THE WITNESS: There is -- I don't have it in my school. Those children are taken from their homes in vehicles furnished by the public school and carried to special classes about the city.

I believe the Richardson School, if I am correct, has one of those classes, and there are other school centers about the city that take care of these children.

There is a social adjustment class for children who have a different kind of problem.

THE COURT: Well, what goes into the special academic --

THE WITNESS: This is a program for children who have retardation in their academic fields. This is where they are given --

THE COURT: Retardation caused from what?

THE WITNESS: Socio-economic background.

THE COURT: Your testimony is that only retardation caused from socio-economic factors are considered in placing a child in special academic?

either in the system or within your experience, if you know, without having a psychological test?

A This was the point I tried to bring out a moment ago with His Honor.

There were still the primary proceedings -- by that, I mean the 205, the request for the examination had been filed, and on the basis of this, if this 205 had been filed the child could be placed if there was space for him.

However, with the shortage of psychologists at that time to carry on the testing and with the number of requests, if there was a period of waiting before, this could be taken care of, but you know that with the additional funds that have been made available and with the improvement of the Pupil Personnel Department, this has been carried on at a much more rapid rate than it had before.

Q But there were people assigned to the special academic track, after you had filed the 205, who had not received their psychological test.

Isn't that correct?

A In prior years, yes, when the class was first organized.

Q Yes.

Now, I would like to just ask you -- tell me how the

principal determined at that time whether a student was severely mentally retarded or merely academically retarded?

A I didn't make any effort to make this determination. I am not an expert in this field. I couldn't possibly determine whether a child had mental -- whether it was simply academic retardation or whether it was a brain damage.

However, you can certainly observe a child who has brain damage, and you certainly know that this child's performance in a classroom or in the special academic class is most unusual and quite different from that of other children.

Q Well, did you make this differentiation?

A No, I certainly did not make it. I could only record my observations in my report or my conference with the psychologist. I could only report what I had observed, but I certainly would make no judgment.

For instance, if you walk into a second grade class and you find a little girl sitting beside her teacher in a reading class and all the other children are thrilled and excited about the story they are reading, and this little girl suddenly begins to sing Jingle Bells, Jingle Bells, and crawl across the floor, this is unusual classroom behavior and right away you begin to wonder. You begin to investigate to find out just what has happened to this little girl.

Q But she would remain, would she not, in the special academic track until some further testing was made, isn't that correct?

A She would have to remain in the school, of course, until there was adequate placement for her, but it would certainly seem wiser to me, as a principal, it seems wiser to me to take her out of the regular classroom where she becomes the subject of ridicule and put her in the small class where she can get individual attention, where the teacher who sees her under certain conditions can give her activities that will compensate for her lack of interest in the regular class and activities, and remove her from the embarrassing situation in the regular class, and observe her and be prepared to give a much better picture of her performance to the psychologist.

We discovered a little girl of this sort just this year.

I made a hurried call to the psychologist who observed her for quite a while, at the end of last school year, when we realized as a kindergartner she was not performing along with the other children.

She strayed away. She was never able to attend. She was never able to participate as part of any group.

For a while we waited to see if in time she would

come into the group. This isn't so terribly unusual.

But as the year progressed her behavior became much more erratic and quite different from that of other children.

And this year when she went into junior primary, her behavior was even more difficult as far as classroom adjustment was concerned.

So we called the school psychologist. The school psychologist came and while she was there for her regular appointment we spoke to her of this child and she immediately, because, of course, we had written up the 205 for her and it was there -- she immediately called in this little child and her recommendation is that she be taken -- I haven't received her recommendation -- her verbal recommendation to me was that the child be given special attention because she is not performing in such a manner that she should continue in the classroom.

Now I have not received her written recommendation at this time. It will come to me after, of course, she goes back to her office and writes up her findings.

However, she stopped right on the spot to give this child an investigation or testing and interview -- all that goes into the testing of the child.

Q Is the child still in the junior primary?

A No, she isn't.

Q where is she now?

A I have put her in the special class. She is in the intensive study class at the moment, where the teacher is able to give her a great deal of individualized help.

Q Now, that special class, that is different than the special academic class?

A No. It is -- I explained to you yesterday why I was using this particular form at this particular time to meet my need in my school because at the point I only have six children who have completely -- completed tests which have placed them in special academic, and rather than disperse the class and send them back, I am using the class as a crisis situation for just such situations as this little girl, until such time as the psychologist can get the class reorganized for me.

Q But she is in the special academic class? That is what I am trying to find out.

A Right, if you want to call it by that name.

Q Now, also that is the class into which you assigned this little fello Ricco?

THE COURT: She testified to that.

MR. KUNSTLER: Then I withdraw my request.

BY MR. KUNSTLER:

Q Mrs. Posey, would you say in your experience as a principal of the Maury School, that there have been children placed in the special academic track or the basic track, as it was called going back a year or so, who were not legitimately there?

MR. REDMON: Objection, Your Honor.

I think she has testified that they were placed on teacher-principal evaluation pending an examination.

The record speaks for itself.

MR. KUNSTLER: I withdraw the question.

THE COURT: Rephrase it.

BY MR. KUNSTLER:

Q In your experience at Maury School over the seven-year period, have you found any situation where children who were placed in the special academic track after testing were removed from the special academic track?

A Yes. I can recall one child particularly that we questioned.

He was sort of on the very borderline and it was the recommendation of the department at the time of his testing

that he be placed in the slow-moving regular class.

When we received this recommendation from the Department of Pupil Personnel the child was placed in the slow-moving regular track.

But until that time he had been placed in the special academic class on the basis of the 205, which we requested -- in which we requested that he be tested. But his scores, I remember, were just on the borderline.

Q Do you know the difference between the approach in the elementary school to the special academic track and the junior high school -- if you know?

A I am not familiar with junior high school procedures.

Q Would you say that the purpose of the elementary school special academic track is to -- is that it is geared to what we would call the mentally limited child?

Would that be a fair phrase?

A No. I don't like the term mentally limited because you see this mental limitation could be caused by the things we discussed earlier, brain damage or something of this sort, and I think there have been classes established for this, once it is determined that this the child's problem.

I think I would rather consider it a special academic program is geared to the needs of children who are

academically retarded, socially retarded, or retarded in this area, rather than to say that it is a mental thing because you see this could entail much more for which provision is made.

Q From your experience as an elementary school principal with the special academic children, do you find that in the school -- Maury School, for example -- that there is what we call an adverse reaction to these children, either among the pupils or among the teachers who are not associated with them?

A Absolutely no.

You see, there is a bit of education that has to go on in the school and in the community before any new type of project is undertaken and it is vital in being sure that the program is going to be properly accepted and so before this program went into effect parents were appraised at PTA meetings, the faculty was appraised as to its purpose, and the children -- and children before going into this class -- it isn't a question we are placing you -- there is a conference.

One was held yesterday on which I had a report when I got back yesterday afternoon. One was held with the parents, with the child and with the teacher and the counselor, and this child understands that he is going into the class where he can be given special help so that he can achieve more rapidly.

Q Have you heard the expression "sap"? S-a-p.

Have you ever heard that?

A Indeed. In many regards. Pardon my laughing but you see this is the sort of thing we get in school, you know: Sap, and then there are many definitions for it.

Q Have you heard the term "sap" used with reference -- to refer to either pupils in the special academic track or used by children in the special academic track?

A I have not.

Q Now where are the children taught who go into the special academic track in the Maury School, what room?

A Room 28.

Q Where is Room 28?

A On the second floor of the east building.

Q Now, has room 28 always been used?

A No, sir.

Q For special academic tracks?

A Room 28 was built in the new addition of the building for special classes. It has a fully equipped kitchen and other special equipment that some other rooms don't have.

Q Have you ever had the situation where, in your own experience, or do you know in the school system where the special academic pupils are sometimes taught in storerooms,

custodians' offices, cafeterias -- do you know anything of that?

A. I do not know of that. I haven't --

MR. REDMON: Your Honor --

THE COURT: Just a minute.

MR. REDMON: The testimony with respect to her school, Your Honor.

THE COURT: We will have to limit the testimony to the witness' school.

BY MR. KUNSTLER:

Q With reference to your own school --

A Yes.

Q Let me put it this way, where were they taught before you had the special room?

A I didn't have a class before the special room.

Q What happened to your basic track people then when you didn't have a class?

A You see, I received a new addition in 1961, so the new room and the new program came about at the same time.

Q What happened before 1961?

A You remember in 1959, 1960, 1961, I had just become principal of the school. I was operating two separate buildings, ten classes in Eastern High School and the old

MR. KUNSTLER: Pardon me just a minute.

MR. REDMON: Your Honor, if Mr. Kunstler is going to be much longer, perhaps the witness might like a five-minute recess.

MR. KUNSTLER: No, I may be done now.

THE COURT: All right.

MR. KUNSTLER: No, Your Honor. Anything else would be repetitious.

I have no further questions.

THE COURT: All right.

Mr. Redmon, do you have any redirect or are you suggesting a recess before your redirect?

MR. REDMON: I have one question, Your Honor.

REDIRECT EXAMINATION

BY MR. REDMON:

Q Mrs. Posey, yesterday Mr. Kunstler asked you if you had been given the Richardson Award by Doctor Hansen last year.

A Yes.

Q What is the Richardson Award?

A It is an award that is given to -- I did check on that last night -- may I look at my notes, please?

I remembered counselor asking me and I did check on the plaque to get the exact wording for my own benefit.

It is given for dedicated and distinguished service in the fields of the humanities.

Q Who gives it?

A It is presented by the D. C. Federation of Civic Associations, Inc.

Q Why did Doctor Hansen present the award?

A Well, Doctor Hansen had been the previous recipient of the award.

That could have been a factor, or the fact that maybe since we were school people --

MR. KUNSTLER: Your Honor, I object to this maybe and it could have been. If she knows, she knows. If she doesn't know, she doesn't know.

THE WITNESS: I don't know why Doctor Hansen was chosen to hand us the award. I can only assume.

BY MR. REDMON:

Q Who won that award before Doctor Hansen?

A Well, on the large trophy these names are engraved: Thurgood Marshall, Philip Randolph; Robert Kennedy, Carl Hansen, John and Teresa Posey.

Q Thank you.

MR. KUNSTLER: Nothing further.

THE COURT: You are excused.

THE WITNESS: Thank you, Your Honor.

THE COURT: We will take a five-minute recess.

(Whereupon the Court took a short recess.)

Whereupon

NATHANIEL R. DIXON

was called as a witness by the defendants and having been duly sworn was examined and testified as follows:

DIRECT EXAMINATION

BY MR. REDMON:

Q For the record, will you state your name, please?

A Nathaniel Dixon.

Q Are you employed in the D. C. Public School System?

A Yes, I am principal of the --

THE COURT: Will you speak a little louder so everybody can hear you.

THE WITNESS: Yes.

THE COURT: Will you repeat that, please?

THE WITNESS: I am principal of the Scott, Montgomery and Morse Elementary Schools.

BY MR. REDMON:

Q Mr. Dixon, you have some material there. May I have

it, please?

MR. REDMON: Your Honor, again to facilitate time perhaps the Clerk can mark these documents while the testimony is proceeding.

These are going to be three separate documents.

THE DEPUTY CLERK: Defendants' Exhibits 102 through 116, marked for identification.

(Documents marked as Defendants' Exhibits 102 through 116 marked for identification.)

BY MR. REDMON:

Q Mr. Dixon, will you tell us where the Scott Montgomery School is located?

A Scott Montgomery School is located on P Street, Northwest, between New Jersey Avenue and Fifth Streets.

Q Where is the Morse School located?

A The Morse School is two blocks north on R Street between New Jersey Avenue and Fifth.

Q How long have you been principal of these two schools?

A Seven years.

THE COURT: Just a minute, while we change reporters.

Kaitz fls.

Q Mr. Dickson, how long have you been in the school system?

A This is the beginning of the twenty-sixth year, my twenty-sixth year.

Q And did you begin as a teacher in the public school system?

A Yes.

Q And what school was that?

A I began at the Grimke School on Vermont Avenue near U Street. I then went to the Twining School, which is Third and N Streets, Northwest. Then to the Bundy School. Then to the Cook School as principal for a year.

Q Where is the Bundy School?

A The Bundy School is on O Street between New Jersey Avenue and Fifth.

Q And that is in the same neighborhood?

A Right across the street.

Q Now, where is the Cook School located?

A On P Street, Northwest, between North Capitol and First.

Q Were any of these schools in the Division 2 system at the time you were teaching, Mr. Dickson?

A Well, 10 to 13 is what the division was.

Q The Negro school, is that what you are referring

to?

A Yes, up until 1954. I started in 1940, I suppose until 1940.

Q What are your functions as principal of the Scott Montgomery and Morse Schools, Mr. Dickson?

A Well, generally administration and supervision and general responsibility for execution of an educational program.

Q Mr. Dickson, with respect to the neighborhood that you serve, will you tell us whether it is a predominantly white or predominantly Negro neighborhood?

A The neighborhood, sir, is predominantly Negro.

Q And has it been so since you first entered the school area?

A Since 1940 it has been, yes.

Q Now, with respect to the people who live in this particular area, can you give us an indication of some of the occupations that they hold?

A Well, if I take our school role books as an indication, the occupations are generally domestic, truckdrivers, semiskilled and unskilled work.

Q Have you been able to or do you have any idea what the income range is in general in the particular neighborhood?

A Well, we are a target school under the Elementary and Secondary Education Act.

THE COURT: Now just for the record, as I understand it so far, this witness is the principal of two schools?

MR. REDMON: That is correct.

THE COURT: Now when you say you are a target school, are you talking about both schools or one school?

THE WITNESS: Both schools.

THE COURT: I see. All right, sir.

THE WITNESS:

Which means to be eligible for Elementary and Secondary Education funds the family income is \$3,000 and below.

BY MR. REDMON:

Q Now, as the principal of both the Scott Montgomery and the Morse Schools, Mr. Dickson, do you have any communication with the parents in the particular neighborhood that you serve?

A I have a great deal of communication with the parents in the neighborhood.

Q How does this communication come about?

A Well, it is a two-way communication. We as school people in order to get the help and support of parents to

implement the school program have to go to parents to help with certain problems, such as discipline problems, the problem presented by children coming to school unfed, ill-clothed, and so on.

At the same time, there is another way that communication takes place, and that is when parents come into the school voluntarily to get help with some of their problems.

Right now our secretary is making arrangements for shoes for a junior primary child whose parents came to the school Thursday saying that by Monday the child could not come to school because she didn't have shoes.

Parents come into the school to see if they are eligible and, if so, to make application for lunch for their children, the free lunch program in the school.

Many times parents come into the school to get help for filling out applications from income tax forms on through the welfare applications and other kinds of things that because of their educational level they are not able to cope with.

We have tried to work programs in the school that would influence parents to come in for general educational upgrading, such as an evening program, an evening library program. We have been able to get the school open five days a week from three-thirty to seven-thirty so

that the children and parents can use the school library facilities.

Q Does the proximity of the school to the homes of these children and parents provide any advantage to this communication procedure that you have?

A It makes a big difference. I think it provides an advantage to us and to the parents and children. Parents are near enough to make a visit to the school a part of their day-to-day intercourse, such as when going to the market or on the way to work or doing something else. I don't feel that my parents are economically in a position that they will take time off from work or interrupt their day with other children in the home to come to school, to make a special point of coming to school. But we are somewhere between home and the supermarket or home and the Welfare Department, and we are able to communicate a great deal with parents as they go along doing other things.

If we were not right in the neighborhood and hear these people, we would lose this advantage. I think our nearness, too, makes us as school people a little closer in having a more intimate relationship with the parents.

Q Do you require appointments before your parents can visit you?

A No, we couldn't.

Q Why is that?

A Because to make an appointment, you know, you have to set aside some time; and if people are doing all they can to provide for just the ^{bare} necessities of living, I think they would put off setting aside this time to make an appointment for me.

A parent called yesterday at almost six o'clock, and I was there in the office. She wanted to talk to me about something her child had done in school and she said, these are her words, "You know how those bosses are. Every minute you take off they take it out of your pay; and I just can't afford to do that. So I just took a chance on calling you and wanted to talk to the teacher so the teacher can call me at work or I can call her at school." I don't think this person could make an appointment to see me.

Q Mr. Dickson, with respect to the children coming to school in the morning, is there any variation in the time sequence at which they will arrive prior to the time school opens or begins?

A We have children coming to school in the morning anywhere from seven-thirty through nine-thirty or ten o'clock. The seven-thirty children are children whose parents are working and who have been put out of the house

when the parents go to work. They come to school and wait around until school opens.

The nine-thirty to ten o'clock children are those whose parents more than likely have left them at home in the house to go to school when the time comes to go to school. And, well, knowing children, they just don't get there on time.

So we have a wide range of arrival times, and much of it is based on some family situation.

Q Is there any advantage to the teacher in teaching in a school which is in the neighborhood where the students live?

A I think so, especially handling children who have a lot to get from teachers and the school, a lot of things that in other situations they may get from home. If the teacher is a kind of second mother and the school is to be a kind of second home, then the closer the child and the teacher and the parents and the home and the school are to each other the more we feel we can get done.

Teachers at noontime can run around the corner to see a parent, or in the morning on the way to school stop to see a parent. Or many times we will get in touch with a parent at ten o'clock in the morning, because we want him to see what a child has just done or what he is in the

process of doing, and this nearness helps a great deal.

Q Mr. Dickson, do you operate the so-called three track curriculum at the Scott Montgomery and Morse Schools?

A Yes.

Q Would you explain, sir, the difference between the so-called special academic, the regular curriculum, and the honors curriculum in your school?

A Well, although we operate under the three tracks now you will have to understand at this time we do not have any honor students, we do not have the honors track in our school, because at this time we do not have any children with the honors potential. Three or four years ago we did have a group of them who were grouped along with some children from another nearby school to establish an honors track.

I do have a special academic class in each one of the schools. In the Montgomery School, which is the larger school and has better facilities for lower grade children, this school goes from kindergarten through grade six. The Morse School starts with grade three and goes through grade six. It is an older building and doesn't have the special rooms that lower grade children need with toilets right there in the classroom and so on.

In the Montgomery School I have the primary special academic class, which at this time has ten children

in it with a possible expansion level of eighteen. And these children's ages range from just below eight years through ten years.

At the Morse School where the larger children are my special academic class is eighteen in number, and those children's ages run from ten years to, on through thirteen years.

Q With respect to the determination as to where a child should be, that is, honors, regular, or special academic, what are the procedures or processes undertaken by the school administration and this includes, of course, you and the school?

A Well, the large bulk of children, as you know, are general. In a case of a general student whose behavior seems--

THE COURT: Just a minute. I wonder if we could start in the kindergarten. Would that be easier?

MR. REDMON: You mean with kindergarten, junior primary and what that is and so forth?

THE COURT: I don't want to interfere with your examination. For example, I just heard for the first time that junior primary was considered a special academic section.

THE WITNESS: No, I did not say that.

MR. REDMON: That is what they call a primary special academic and intermediate special academic. It is just a refinement of special academic.

THE WITNESS:: It is a special academic class for younger children, and there is another one for the older children. The special academic class is an ungraded kind of organization within the class to get as much homogeneity as possible. One thing we can do if facilities are present is to have the younger children who have this special academic problem in one class and the older ones in another one. Then social grouping, you see, we can gain something by social grouping in the area of games, for instance, physical education, and many other things that older children as a group can do separated from younger children, especially since if we used achievement as the only criterion, you would find children ranging from seven and a half to eight years old in the same class with thirteen year olders; because by and large, all of them are reading and performing in arithmetic and other academic subjects at a quite low level.

THE COURT: Mr. Redmon, you better take the witness. I am sorry, you go ahead with the examination.

BY MR. REDMON:

Q I think what Judge Wright has in mind, and we can

proceed from that point, Mr. Dickson -- let me ask you this.

Do all children go from kindergarten to first grade or do some go to junior primary and, if so, how do you arrange this scheduling? What is your procedure, Mr. Dickson?

A Well, all five year olders who are registered by their parents go to kindergarten. This is not mandatory. They don't have to go to kindergarten. They don't have to register at five years old. But if they do, and most parents do register their children for kindergarten, they have a full year in kindergarten during which time the program is geared toward getting children ready to learn the tool subjects in first grade and beyond. They learn such things as auditory and visual discrimination, developing a kind of independence, even so far as being able to tie your shoelaces, go to the toilet, put your hat and coat on, and so on, not get lost in the school building. An effort is made there to introduce children not arrangements so much as you would do in reading but the very existence of symbols that mean certain things, going anywhere from triangles and circles and so on to letters that when put together in a certain way may enable you to write your

name.

Children are introduced to the world outside of home: streets and cars and buses and the farm and the zoo, animals, and various objects such as the umbrella and various tools, a hammer, and all these kinds of things which are a multitude of readiness factors which enable children when they get into first grade to have basic understandings and concepts upon which they can base their reading and arithmetic. What is long? What is the difference between long and short? Where is up? Where is down? What is wide and what is narrow? These kinds of things, a readiness program and an introduction to school, ability to get along with other children and work in a group and a gradually increased attention span where a group of children can pay attention to one person, because at four and five years old, if you watch children playing, you will find that whereas you say they are playing together, they are not really playing together. They are playing at the same time, but apart. There is not much cooperation. Five children will be each working with two blocks at a time, maybe with their backs turned to each other; and every once in a while one will say, look what I did. And you say that these children are playing in a group. They are not playing together.

So then children have to be trained to concentrate

and work together.

Now, at the end of the kindergarten year we expect, then, that a child would progress enough to be able to do some of these things and handle some of these concepts and have some of this background.

If they are not, we feel they ought to take some more time to do this, and this is where the junior primary comes in.

Now the junior primary, then, is a grade which begins to reinforce and fill in the gaps as far as possible missed in kindergarten, all directed toward making a child a good risk to learn to read and learn numbers in the first grade.

If he is a poor risk and does not succeed when we get into these more sophisticated and complex kinds of things in the first grade, right away, you see, he has experienced failure; and I feel that they then escalate this failure image to themselves and really don't progress.

Junior primary is a flexible grade. We do not say that when a child is not ready at the beginning or at the end of one year and plans are made to place him in junior primary the next year that he is being placed in the junior primary as a grade to stay for a full year.

If after five or six weeks, a half year, or some

during the year
other time/the junior primary teacher can see development
and improvement, then we look toward a different placement
with the group he would have been with in the first place
in the first grade.

Most of the children who go into junior primary
spend the entire year in it, but many of the children do not.
They come out into the first grade after a few weeks. Some
of the children who spend an entire year in junior primary
progress enough towards the last part of the year for the
junior primary teacher to take them into first grade work,
thereby missing first grade when the end of the school
year comes, and they go into the second grade, which there
again, puts them with the original group they started
with.

At the end of the 1964-65 school year we had six
children who went from junior primary into the second
grade, and they are doing well now in third grade. At the
end of this past year, the '65-'66 school year, we had
something like nine who went and are now in the second
grade.

Q Now, with respect to a determination as to whether
a child needs the additional support in junior primary grade,
Mr. Dickson, how do you go about making this determination?

A There are several factors that help us to make this determination. I guess the one that meets the eye is a readiness test. However, it is not solely on the basis of a readiness test that this determination is made. The teacher's judgment is the thing. The teacher after having worked with the child for a year together with a child's score on a readiness test helps us make this determination.

Now, the readiness test is a simple kind of thing. It is nonverbal in nature in the sense that the child doesn't have to read any directions. Any verbal aspects that the test has would come about because the teacher does have to explain what she wants the child to do and so on.

But this test is rated, the scale is something like superior, above normal, normal, below normal, poor risk, broad categories, you see; and children who fall in the below normal and poor risk category are usually those we try to give additional seasoning and readiness work in the junior primary together with teacher opinion, because many children who score below normal are upon recommendation of their teachers sent into first grade.

And then there are some others who may score normal, but because of certain basic unreadinesses that are not measured by the test itself, that the teacher knows about from her day-to-day work with this child, we recommend

or the teacher recommends that this child should be tried for a while in the junior primary.

Q Now with respect to the determination that a child in need of a special academic curriculum, Mr. Dickson, how do you go about making this determination? I mean when I say you I mean the school administration again.

A The curriculum for the child would, especially in the case of a junior primary child, be based mainly upon what deficiencies are pointed up in the readiness test. Teachers do have the test booklets, that is, the test booklets are at the beginning of the school year put into the hands of the junior primary teacher and put in the hands of the first grade teacher in cases where the children scored well and went into the first grade; and based upon a visual record there and conferencing with the kindergarten teacher the junior primary teacher bases the child's program; and custom cuts it as closely as possible for the individual child, because we realize right from the very beginning that here is an interim grade that a child may progress through and out of on an individual basis.

So then we can find that, for instance, matching on a page of the test where a child is to match certain objects that look alike or in discriminating the difference between a circle and a line or a triangle and a circle or where a

child has a deficiency in knowing what a horn or a wheelbarrow and some other things are, you see. You can tell just what this child's readiness shortcoming is, together with the fact that this child has not improved to the point where he can pay attention over short periods of time. You see, these are the things that you get by observation and transference and conferencing one teacher with another. These are the kinds of things that you use to determine what will be the emphasis for an individual child in junior primary.

Q Now, Mr. Dickson, as you have indicated, you do have some children at your schools who are presently being curriculumed in the special academic curriculum. And would you tell us, sir, how you go about, when I say you again, meaning the school administration, how do you go about determining that this child should be so curriculumed?

A After the child is placed in special academic, is this what you want me to explain?

Q No. I would like you to start from when do you first determine that there is some need for such a curriculum?

A Well, with experience and training with the general student normally reacting in a classroom, there

is some norm that is established. When children don't conform to the norm of the general bulk of the children in the class, then it kind of points up to us that we need to take a look to try to find out what it is that makes this child react to the school situation and in many cases out of the school situation we find that by and large the children who have some kind of deviation in school have other problems. The same kind of thing happens on the playground, in the neighborhood, and everywhere else.

But, anyway, when something happens or from general observation in the classroom a teacher realizes that this child just does not seem to fit into the normal pattern, it is brought to the attention in our case, because we have one, a counsellor, who then begins to go over the child's previous school records to find what he can find there. Perhaps it may be that the child just seems dull and lethargic because he has a health problem which would show up on the health record. If it doesn't, maybe it indicates that our doctor or nurse ought to look at the child. Does he have a record of truancy which means that he has just missed a lot of school work? Or are there other factors that can be found out on the cumulative record and the health record of the child? If the person is available and if it is a

person who has been in our school and has had some experience with another teacher, O.K., here is another resource.

When we find, then, that through some relatively simple gathering of information about this child which would give us some understanding and allow us to make some adjustment, like having a medical defect corrected, or getting him to come into school to take another look to see what he can do, if he is at school regularly, and so on, we request the Department of Pupil Appraisal and Pupil Personnel to test this child. Then the psychologist comes to the building to test the child and makes a recommendation. In many cases the psychologist makes a recommendation that does not recommend any special placement for this child in so far as another track, but there may be certain adjustments that we can make right within the general track.

In other cases where the psychologist, after having given a battery or a number or variety of tests, may recommend to us that the child be put in a special academic class.

From then on we know then that this child has been pulled out from the general children for some special help. One place we can get special help is by sheer time and numbers, the fact that 18 to 1 gives a child in a

special academic class much more attention than 31 to 1 in a regular classroom.

As in the case of the Morse School, as I just said to you, this year at this point every child is able to enjoy ten percent of Mr. Wick's time. This is the teacher of the special academic class that has only ten children in it. Whereas if any one of those ten children were in any of the other classes, the best he could enjoy would be 23 to 1 because that is the smallest regular class that I have there.

So here we feel that there is some gain.

Then the teacher's personality, the teacher's preparation, the adjustments and facilities I as a principal can administratively provide for them, their books, their materials, their use of time and other things can be adjusted to a person, a child who needs some additional help or some additional adjustments.

Q So far as the curriculum content is concerned, Mr. Dickson, just how does it differ from, say, the curriculum which the child in the general track or the honors track might have?

A It differs generally only in the sense that we realize that if the child has a reduced academic potential

that we may be able to give him the same things only at a slower pace, or with some adjustments to get increased motivation, or with adjustments we try to carry through the same curriculum.

Now the books I brought in here are some Classmate Editions of some of the regular basic texts that we use in our regular classrooms.

A Classmate Edition is a book that has been published to take into consideration that some children that are the same age as other children or in the same classroom as other children or whom you want to do the same work as other children, can't work quite as fast or quite as much in detail.

The regular edition is made up with the same cover, the same page notation, the same table of contents, and everything as the Classmate Edition. The Classmate Edition differs only in that the concepts are simpler, the vocabulary is easier, and the format is a more wide open form for children who are having difficulty in learning to read or do any other kind of academic work. There is nothing different. Page 25 in a regular edition if it has a picture of a ship on it will have a picture of a ship on page 25 in the Classmate Edition.

I think this is important that I provide my

special academic classes with materials of this kind, because I do want them to gain the same concepts and do the same things, not feel any different from other children, but to make an adjustment for their increased demand on time and a simplification of vocabulary and so on and we provide those for them.

In addition to that, many of our materials in the special academic classes are supplementary materials that have a high interest level for children who have failed and need to be really interested in doing the same thing over maybe in a different way.

Two of the books I have there, Mr. Redmon are some of those books. One is Cowboy Sam, I think, and another one is another one that we use on the upper level of the special academic classes where boyss are not interested in reading about baby things, that is, learning baby words reading about baby things. They don't if you can catch their interest mind learning baby words if the content is about something hearer to their age level and interest level.

Q I am reminded, Mr. Dickson, when I was over your school last week that there were some Readers Digest in one of the special academic curriculums. Are these specially

designed books?

A Yes. They are called Readers Digest Skill Texts. They have a high interest level, but very low level of vocabulary and the concept level is simplified. The format is more adult, too, you see, and this gains something.

Q If necessary, Mr. Dickson, do we have one of those to put in the record?

A Yes.

Q Mr. Dickson, will you identify these books, please, and explain what they are for us? If you will, refer to them by the defendant's exhibit number for the record.

A Yes. This is Defendant's Exhibit No. 105. It is the Classmate Edition in a series of books published by Lyons and Carnahan Company. This is the Classmate Edition to accompany a regular edition where adjustments are necessary for children whom you want to keep in the same curriculum but in a simpler way.

The 106 exhibit is the child's workbook that goes along with the textbook that has exercises that the child can do independently after having covered certain portions of the book.

Q Now, is there anything in the basic textbook there which indicates the number of words which it intends

to teach during the course?

A Well, there is a listing of words in the back of the book. Now this one is a simplified version of the Third Reader.

THE COURT: Give us the number, please.

THE WITNESS: This is Exhibit 105. It is a simplified version. It is called the Classmate Edition. It is a simplified version of a Third Reader, Level 1. It contains the same stories and illustrations that are in the regular edition of Stories from Everywhere, but presents fewer new words and fewer running words. The sentences and paragraphs have been reduced in length, in keeping with the needs of less mature readers.

Since affixed words are particularly difficult for the less mature readers, a minimum of such words have been used.

MR. KUNSTLER: Your Honor, I think the record should indicate, if the witness is reading from the book, the record ought to indicate that, that it is not his own testimony.

MR. REDMON: The record will so indicate.

THE WITNESS: I read this, because this is one of the reasons I bought this book at book-buying time when book salesmen come and we get brochures and other

Q What is contained inside the cover?

A I am just checking this, Mr. Redmon. I am checking this because there is another part to this. Now this is reference material, and it has instructions for procedures for ordering library books, but this is mostly reference material: dictionaries, encyclopedias, and so on.

This is a magazine list for elementary schools.

Q What is that number?

A 103 is a magazine list for elementary schools, and 104 is the textbook list for elementary schools.

Now along with that, maybe I should have brought it, is the general list of library books, not reference books. But here, for instance, in this textbook list for elementary schools, there are books provided here to use to make the adjustment for children who have any kind of special problems.

From this list I am able to order the Classmate Editions for my special children and the regular edition for my other children. From this list I can get the supplementary material such as the Cowboy Sam and the Readers Digest Guild Text and others. There is a wide choice of materials to cover the full gamut of achievement

in the schools. And I think this is what I would like to say about this: that there are materials available. The magazine list and the library list are, of course, a part of what we use to stock libraries.

Now we have a library in our school and a full time librarian; and when I say our school, unless you want me to specifically say Morse or Scott Montgomery, I regard them as one school, because they are both in the same school zone. They are two blocks apart from each other right between the two same main streets; and because of the difference in facilities presented by one as against the other because of the age of the buildings, I operate the two as one. We have one parents teachers association, one library to serve the two buildings, although in the Morse building we do have a supplementary travelling library where there are books that move around from classroom to classroom on carts. But the library where we have reference material and a card index and other kinds of things that you not only need to use to enjoy a library but to learn study skills is at the Montgomery building. We use the same auditorium and so on.

We have a library the range of material which goes everywhere from material that can be read on a preprimer or primer level up through material that can be handled by

seventh and eighth grade children to cover a range of abilities and interests.

We do have audiovisual equipment available in the library that children can use on their own for self-teaching. They are free to go into the film room and get film strips or films from second grade up. Our simplified machines are operated by the children, and they can just as easily as they take a book from the shelf in the library and sit down at a table to read, they can take a film or film strip from the shelf and sit down in the little sound center with earphones and take advantage of this.

Now the special academic children are in the mainstream of school life everywhere outside of their classroom. They take part in the regular language arts program. They take part in our scheduled library program and the library browsing program. They take part in the after school program. They take part in all the assembly programs. They are on the playground at noontime and mid-morning during the regular physical education activities along with the other children. They eat their lunches along with the other children.

The only place they are apart, and no more apart than any other classroom is apart from another classroom,

is when they are in their classroom.

Q Mr. Dixon, do you have the advantage of utilizing as a part of formal education any field trips outside the school environment?

A Since 1960-'61, we have had money for field trips that is coming to us by way of what was the Ford Foundation language arts project, which is a part of the Ford Foundation great cities, great area mosaic that worked in the fifteen largest cities in the United States. Our funding by way of the Ford Foundation was for a language arts program which started in seven schools, one of which was the Scott Montgomery School.

This project started with kindergarten grade one and moved on up year by year up to grade three.

Now along with a special teacher who concentrated on language development among the children in those grades in the school came some other advantages, one of which was approximately seven hundred dollars per year for field trips. So we have been able to take advantage of this, the basic premise being that our children need experiences, they need to learn how to talk and write and read; but certainly before doing any of these things, they have to have things to talk about and understand the things they

may read or have something to write about, because these subjects, language doesn't have any subject matter of its own. It has got to be built on some experiences.

Q Mr. Dixon, you have indicated earlier that you have no honors class at this particular time. Have you had children who were evaluated as being honors potential in the past?

A Yes. We had a group of nine, I believe, who were evaluated and found to be honors potential at that time. These were children going into the fifth grade. So that nine along with several children from several other schools nearby were housed in the Scott Montgomery School as an honors class.

At the same time we have had some other children, most of whom were from other schools in the neighborhood. You see, all of them made up, I guess, about 22 children who were a sixth grade honors class which moved off the top at the end of that year to junior high school, and at the end of the second year the fifth graders who were then sixth graders moved into junior high school.

Now, since that time, we have had several children who have been tested through the procedure of being candidates for the honors potential class, and this is what

they are in elementary school, they are honors potential. We can't say that they are extremely bright children and will be honors or accelerated children at that time. In the junior high school and high school is when this is kind of finalized and tied down that this may be a person who would go the whole way through his educational and other life as well.

We have had several children who have been candidates for the honors potential classes. In consultation with their parents and not having an honors potential class at the school, the parents saw fit to keep them in the school charging us with whatever adjustment we could make rather than sending them out of the neighborhood.

The nearest fourth grade honors class at that time was at 8th and T, at the Cleveland School. And one boy in particular I have in mind lived at 4th and Neal Street, which is approximately eight or ten blocks that he had to come to school at that time.

Q Mr. Dixon, does the fact that you have no honors class at the present time or that you have a special academic class, does this indicate to you that the three track curriculum is a discriminatory device with respect to either Negroes or low income families who have students

in your school?

A I don't, no. I do not think that it is discriminatory.

Q Mr. Dixon, do you have any temporary teachers?

A Yes.

Q How many teachers do you have now?

A I have 23 in the Montgomery School and nine at the Morse School.

Q And, roughly, how many temporary teachers do you have?

A I have eleven, one at the Morse and ten at the Montgomery.

Q Mr. Dixon, from your experience at the Scott Montgomery and Morse Elementary Schools with teachers that you have now and have had in the past, is there any difference in potential or ability between a temporary teacher and a tenure teacher?

A No. My experience has been that my temporary teachers have had the same potential as my permanent teachers. During my time as principal, I have fallen heir to a number of permanent teachers. I have had temporary teachers who came to me as temporary teachers who have been made permanent teachers. I have right now some temporary

teachers who came to me as temporary teachers who have been with me in two or three cases as many as five years who are still temporary teachers whom I would not exchange for a permanent teacher to have a permanent teacher.

Q Is there any range of experience at your particular school in terms of years of teaching for temporaries?

A For temporaries?

Q Yes.

A One temporary teacher in particular who is beginning her third year at Montgomery School came to Montgomery School after fourteen years as a permanent teacher in North Carolina, a highly skilled teacher, who has a North Carolina license, and who can have permanent status there, and maybe lots of other places, too, that just maybe don't have the requirements that she come up to a certain level on the national teachers exam.

Q What do you look for, Mr. Dixon, in determining whether or not you have a teacher who you consider to be a capable or able teacher?

A Well, if I just visualize this lady, she came with an enthusiasm for school work. She likes to work in a school because she likes children. She doesn't regard herself as a

kind of boss, I guess, and a chance to order, you know, thirty or thirty-one or thirty-five, twenty-three, or however many she has per year, around. She has the ability to relate to children to the extent that I find them sitting in her classroom at noontime around her desk talking to her.

I find that her classroom is attractive and colorful but not decorated just to be so. The attractiveness and color comes as a result of work that is going on. The bulletin boards are changed, and they are not ashamed to put something up on the board for display for others to see that is less than perfect if it serves a purpose and if it is a contribution that somebody in the class has made as contrasted to a teacher whose classroom at first sight may be the kind of classroom where everybody is doing perfect work, because everything you see in there is just perfect.

MR. KUNSTLER: Your Honor, I don't want to interrupt, but I wonder if this is relevant to our particular lawsuit.

THE COURT: I think he is about to finish this line. Were you finished, Mr. Dixon? Did you want to say some more about this teacher?

THE WITNESS: Well, I would like to, yes.

THE COURT: Go ahead.

THE WITNESS: This is a person who gets along with me and other teachers and is interested in improving herself and the school program. She doesn't mind staying after school just in general on a day to get ready for the next day, nor does she object to in-service meetings with me or other kinds of supervisory personnel.

MR. REDMON: I have nothing further at this time, Your Honor.

THE COURT: It is 12:30. So we will recess now until quarter to two.

(The Court recessed at 12:30 p. m.)

finish out the week and probably close the presentation of the defendants' case.

THE COURT: This week?

MR. REDMON: I think so, Your Honor.

THE COURT: All right, sir. Well, you explain to Mr. Cashman at the appropriate time what took place when he wasn't here, and I am sure we can resolve it without any further ado.

MR. REDMON: I can assure Your Honor, and I am sure Your Honor knows that we are doing our best to keep the flow of witness on a --

THE COURT: I have no question about that.

CROSS EXAMINATION

BY MR. KUNSTLER:

Q Mr. Dixon, my name is William Kunstler, and I am the attorney for the plaintiffs in this lawsuit, and I would like to go over some of your testimony with you, and we could start essentially with the two schools of which you are principal.

In your direct examination Mr. Redmon asked you how many teachers you had at both schools, but he did not ask you the race of those teachers. I would like to know, are there any white teachers included in your schools?

A All of my teachers are Negro teachers.

Q And all of your students are Negro students, too; is

that correct?

A No.

Q You have white students?

A Yes, I have one white student in each school.

Q I see. And do you know the pupil population of your schools?

A At this time Montgomery School is about 636, give or take four or five because we have discharges and entries every day. It more normally runs around 249, give or take four or five.

Q And in each one of those schools you have one white child?

A Yes.

Q Now, I understand that one of these schools -- I think it's Montgomery -- I think you indicated qualifies as a target school?

A Both of them do.

Q Both of them do. And would you just explain for the record what a target school is?

A Well, under the Elementary and Secondary Education Act certain schools are pointed up as target schools for availability of federal funds under Title I, funds to be used for compensatory educational purposes, and both of these schools fall within that category.

Q Right. Now, are both schools also in the model school area?

A Both are in the model school area, yes.

Q And both schools also are, as I understand it, impact aid schools; is that correct?

A That's true.

Q Now, let's take a look at Montgomery for a moment. Montgomery, as I understand it, has some 40% of its teachers as temporary teachers; is that correct?

A I said 10.

Q Ten out of how many?

A Twenty-three.

Q Ten out of what?

A Twenty-three.

Q Well, for give or take we would say approximately 40%. Would you agree to that?

A I would agree to that.

Q Now, as I understand it, according to the latest figures I have the school is operating at 129% of capacity. Would you indicate what the capacity is of the school?

A Well now, if we take a thirty-to-one pupil-teacher ratio, with 22 regular classes and one special academic class, which runs 18, we'd have to figure that out.

Q Well, do you know -- I am talking about the total

pupil capacity of the school. How many does it hold on a thirty to one basis? Do you know?

A All right. No, not right now. I can figure it out. At thirty to one -- OK, 660.

Q And how many are there now?

A Approximately 636.

Q So it is your testimony there that they will be operating under capacity; is that correct?

A We do not have 660 pupils there at this time.

Q I show you Exhibit L-11, Plaintiffs' exhibit in evidence, and ask you if it does not indicate that the capacity as of October 21, 1965, according to the District of Columbia, was 540 pupils?

A This is building capacity?

Q Correct.

A All right, now what is this based on?

Q I'm just showing you the District's figures --

A Yes.

Q (Continuing) -- as to building capacity. I have no idea what it is based on.

A All right, now this figure is different from a figure that you and I established right here based on 30 children per class and 22 classes. This figure of building capacity from the public schools is a matter of schoolhouse accommodations

worked out by buildings and grounds where the building was built for 540 children. Now we do have some extra rooms that have been put into operation for classrooms. They are comfortable classrooms and children and teachers can work well there, but this additional capacity does not show up in the school house accommodation figures that this comes from.

Q When were those rooms put into operation?

A I have had one room in operation for three years, but still is not a room that was put there in 1949 when Montgomery School was built to use as a classroom.

Q What was it put there to use as?

A It was put there to use as a special room for recreation.

Q And what's the other new room that you have in operation?

A Well both of the rooms of this.

Q They were recreation rooms turned into classrooms?

A Yes. One was a multiple purpose room which was used for the regular school but as a multiple purpose room. The other one was put there for use by the Recreation Department in evenings after school at the time there was a Recreation Director and a recreation program at the Montgomery School. Now, these rooms are still, according to schoolhouse accommodations, not regarded as classrooms. Therefore, this 540 does not

show that.

Q I wanted to ask you this: The school was built in 1949, wasn't it, Montgomery School?

A Yes.

Q And do you have today a thirty to one pupil ratio in those classes, teacher-pupil ratio?

A We do have about a thirty to one, or less. I have some first grades, one first grade that runs to 34. The others are 32, 30, 31. I have four third grades that are running 23, 24, 27, 23, something like that.

Q What about your fourth, fifth and sixth, how do they run?

A The fourth grades are running about 33 apiece, fifth grades, 30, sixth grade, 30-31.

Q Do you have the same ratio at Morse?

A Generally, yes.

Q When was Morse built?

A Morse was built -- this is my membership for the Montgomery School, and if you want more exact figures on the Montgomery School I can give those to you from here. This is the membership as of October 12th. Morse School, to answer your question, was built somewhere at the turn of the century. It's an eight-room building basically that has a ninth room which was put on, that is, it's a large room that was improved

to be a classroom about five years ago. So this is the ninth classroom.

Q How do you alternate your time, by the way, between Morse and Montgomery? First of all, how far apart are they?

A Two blocks apart, the two schools are, one on P Street and the other on R. They are both between New Jersey Avenue and 5th.

Q How do you apportion your time between the schools?

A Most of my time is spent at the Montgomery School. Well, let's say that I give Montgomery and Morse a three-fifths, two-fifths kind of division of time. Our main office is at the Montgomery School because of the facility there. Our library and other things are there, and whereas on some days I report directly to the Morse School to be there for the entire day being in touch with Montgomery School, most days I report to the Montgomery School and am on call at all times to the Morse School. Parents come to the school, either to Montgomery or Morse to see me at the office and whichever office they come to in a matter of ten minutes I am wherever they are because the schools happen to be just that close together.

Q Now, Montgomery has the library; isn't that correct?

A Yes.

Q Now, did you recently receive a large number of library books at Montgomery?

A Yes.

Q How many?

A I don't know the exact number of library books. I can tell you that funding-wise, or fund-wise, we received \$1775 from the Twentieth Century Club for books, that I got an additional, I believe, \$800 from the D. C. Public Schools over and above our regular allotment for library books. I had an amount of money last March by way of model schools through Title I, ESEA funds, for library books, and here, as of this September I had an allotment of \$800 for library books through model schools.

Q Now, tell me this, Mr. ^{Dixon}~~Dickson~~, prior to receiving these grants and allotments, do you remember how many books there were in the Montgomery School library, approximately?

MR. REDMON: If Your Honor please, may I object to the question. Aren't we really discussing a school system as it exists today or the last year or so? Why do we go back three or four or five years?

THE COURT: Well, just for purposes of history. I assume part of this case has an intent factor in it and I assume that this may bear on the intent.

Is there a question now?

MR. KUNSTLER: Yes, there is a question, Your Honor, pending.

THE COURT: Mr. Dickson, do you remember the question?

THE WITNESS: Yes.

THE COURT: Will you answer it, sir.

THE WITNESS: Did you establish the time?

BY MR. KUNSTLER:

Q I'd say prior to getting the Twentieth Century grant and the Title I and the model school, two grants, I believe, under the Model School Program?

A Prior to this happening let's say we had 400 usable library books, all of which -- and these were books that we had purchased over a period of two years, the two years during which time the public schools of the District of Columbia gave elementary schools an allotment of fifty cents per child based on October enrollment for library books. Now, previous to that time we didn't stand to have any library books because no allotment was made for library books, and the books that we did put in the library were books that first we were able to purchase from our regular book requisitions that are usable in a library situation such as the reference books and the larger dictionaries and some of these kinds of books, along with sample text books given to us by the text book companies, along with some books that we were able to get from some of the suburban schools, one school in particular, the name of which I don't remember at this time, that had a PTA book drive and presented

the books to the Montgomery School. We didn't stand to have any of those, however. I mean this was all a boot-strap operation.

Q This was a scrounging operation?

A Right.

Q Do you remember the time, what year it was that you acquired those first 400 books?

A Possibly during the school year '62-'63.

Q I see. Now, I think I've asked you this, but just to make sure, Morse does not have a library and those students are added to the total of the students at Montgomery that use the Montgomery library?

A Yes.

Q Is the Morse School operating at capacity, do you know?

A The Morse School should be near capacity, or if we take schoolhouse accommodations, above capacity.

Q Now, that would be true, just to finish up Montgomery, of Montgomery as well, isn't it? If you take schoolhouse capacity they are above capacity?

A Right.

Q Would you say, to finish up the library situation, that the majority of the books that are presently in your library today came to the school within the last nine-month

A No, I don't see any.

Q Has there been any discussion by you, Mr. Dixon, and members of the school hierarchy, the person in charge of curriculum, or the person in charge of libraries or books, in which you have discussed these particular text books with their absence of any Negro figures?

A Yes, we have discussed those text books and many other basic series of text books that were on the market before the text books, these text books you said are geared toward the ghetto child. Yes, we have discussed these things. We have some of the Detroit books that came out of there which attempt to do this and they didn't really, in our minds, make that much difference. They need a great deal of improvement because, you see, any book company can take those white faces and scatter some brown faces in there, you see, and this is what some of the book companies have done. Now, if we regard certain things in American life as standard, or a kind of point that we would want to take our ghetto children, as you call them, and move them up to, if we don't want to continue to shake them around in the same bottle and show them only ghetto surroundings, then, you see, this book doesn't have the deficiency that maybe I think you are trying to point out with these books, the fact they don't have Negroes in them.

Q Are you saying that you think it is better pedagogically

for the ghetto children, particularly the Negro children that we are discussing now in the socio-economic group which you have described, to see in their text books only white middle class communities?

A I'm not saying that, no.

Q What are you saying?

A I don't even mean to imply that. I mean to take brown faces and put in the average middle class oriented text books just so that Negro children can see Negro faces isn't educationally -- get that much gain or make for that much gain in teaching children. ✓

Q Well, I -- go ahead. Did you want to say something?

A If the availability presents itself to me and my teachers of having books that treat ghetto life in the way that they can present the familiarity that children can begin with of treating their surroundings and then begin to move them on ahead into a larger world, like the suburban world, and like some of the other things you are pointing out in these books, OK, we'll use them, but if the book is not a well constructed text book, and if it doesn't have vocabulary and certain other well planned things that I feel a text book ought to have, the fact that they have some brown faces and some ghetto houses doesn't make that much difference to me as an educator.

Q You don't think it is important that there be any

circumstances which are --

A I'm not saying --

Q Let me finish my question.

A All right.

Q If there are any circumstances of the child's immediate life to which he can relate that should be portrayed in the books he reads?

A Yes, there are. Yes, there are. I do think there ought to be many circumstances in the child's present that should be and could be portrayed in textbooks. Now, if you are talking about the availability of textbooks right now to me that do this, I don't know where they are.

Q Well, I won't bother to go into them at this moment with you, but as long as we are both agreed that you have heard and have seen some textbooks --

A That I have bought -- I have them in the building now. ✓

Q And are you using them regularly in the classes?

A No.

Q But in terms of relation, I have you Exhibit 116, for identification, which I believe is keyed to 115, if I'm not mistaken, of the textbooks, and you have this little soliloquy:

"Jack saw Tom near an airplane. He said, 'This is the Fourth of July. I have some money. I will ride in the airplane. It is my fourth ride.' Tom said, 'I have

money. I can ride, too."

Would you think that question is in any way related to the lives of the children in your community?

A It may not be, just the way this thing is constructed here, but it's a story in a book and it is designed at this particular time to improve reading skills, so there is vocabulary design there, there is sentence structure. There are many other things inherent in that little soliloquy, as you call it, in the book which are put together to teach children to read or improve their reading skills. Now, my children are familiar with airplanes. They might not be in a situation where they happen to be -- they can put themselves in that place standing near an airplane and say, "I have some money in my pocket, I'm going to take a ride, and this is my fourth ride." I can't say, you see, that this would be within the experience of any of my children, but I don't see either where for certain purposes that is in any way damaging to a child with whom we would use it.

Q Would you say this, Mr. Dixon, as an educator in talking about reading, would you agree that it might be easier to teach a child to read, from your own experience, if he has a reference points those things which are familiar to him, things he does every day, sees every day?

A Yes. I feel that there is a certain nearness, a

familiarity with certain things that may stimulate children to learn to read a little bit faster or better because of their familiarity. At the same time there is familiarity and then there is the question that their opinion will be completely foreign and beyond the comprehension, beyond the concept comprehension range of children. Now if this is true, the material is practically useless, because then if we are talking about teaching of reading, the child may learn to call the words and recognize the words but there's no understanding, but it does not have to be that the material being read is right within the experiential background of the child for it to be entirely useful in teaching reading.

Q : Well, I'm not even asking whether it's entirely useful. I am just asking you whether you thought as an educator it might be better pedagogically to teach these children -- now we are talking about special academic children -- reading from experiences more closely related to their own. That was my question, not whether the other would be totally useless, whether it would be better pedagogically to --

A It may be better pedagogically, yes.

Q You mentioned something about the film strips that were shown in your school. Can you give us some subjects of those film strips? What do they pertain to?

A Well, the film strips and films are educational films

with a knight then my children have, so there again the teacher has to give them in some way some kind of background for this concept they are trying to learn.

Q And also an experience with the ghetto which your children have had but the more advantaged child might not have.

A All right, this may be true, but is it necessary that they have the experience with the ghetto?

Q I am not an educator and I don't know.

Do you think it is important that children who are advantaged children, from a pedagogical point of view, do have some knowledge and experience of what the ghetto is and what other races are?

A Now, you are asking me two different things.

Q Start with the ghetto?

A All right. Have a general picture of a ghetto, the popular version of a ghetto, I think it may be worthwhile that some more advantaged children who don't live in a ghetto have an idea of a ghetto to really know what a ghetto is like in all its sordid seemliness. I don't think it is necessary from a pedagogical standpoint that more advantaged children know, really know about a ghetto. By the same token I think that it is more important that ghetto children know more about what it's like to live somewhere out of a ghetto, because I just don't believe that if somewhere along the line you and the other

people in this courtroom and I feel that maybe life outside of a ghetto is normal, or not normal, is standard, desirable American living, that I don't think I ought to bring somebody who already has the advantage of this down to see what abnormal, substandard living is. I feel I ought to be able to move my children up that they can look forward to moving up, and here again whereas I do want to start children where they are, starting children where they are does not mean that you must rub their noses in where they live, that based on experiences and concepts that they can learn the tools of learning, and so on, we start them where they are, but to have them continually going around in ghetto life in books and pictures and everywhere and leaving out the idea that they want to move on upward into standard middle class life is something, you see, that -- well, this is just the way I feel about this. And these books here again, whereas we could have better materials that bring some things closer to our children, certainly we all need some kind of a dream and know what it is like to be standard or normal.

Q I'm not suggesting for a moment, Mr. Dixon, that we rub anyone's nose in these --

A In deprivation.

Q (Continuing) -- in deprivation. I was merely asking you whether it was pedagogically, when we were going back to

the reading situation, whether it was better to have some close at hand references, and I thought you agreed that it would be better; if the texts were available, to have such references.

But while you are on this particular subject that we have spoken about, do you believe as an educator with 26 years, I believe, experience with these children, both in the Division II schools and now in your present capacity, that there is a frustration index with reference to children who are in the ghetto and see only in their textbooks the more abundant middle class life of the white man?

A I feel that there is a frustration index in living in a ghetto and being subjected to the problems of a ghetto. Seeing only white children in a book doesn't increase this frustration, to my mind, at all. The living conditions, economic status of his family, and many other things are the things that would create the frustrations in the first place and maintain them or perpetuate them in the second place. If these ghetto children come to school and find a good school program with materials and equipment to be used in learning, if their teachers are friendly and willing to help them, if they are subject to all of the advantages of a school system in a city, to my mind this does more to relieve the frustrations that ghetto living may have on children or may create in children than the mere using textbooks where they see Negro children or more advantaged

children or being in school with some children of another race.

Q You know, do you not, that there is a school of thought among school people that it is important that textbooks be keyed to the experiences of the pupils who are exposed to them? You know that, do you not?

A You see, you are saying textbooks that are keyed. I don't disagree with you there at all.

Q Well, I'm just asking whether you know there is a school of thought?

A Yes, I'm aware of that.

Q Mr. Dixon, with reference to the school you talked about, the friendly school, the school providing -- and I would agree with you to some extent -- the school providing a kind of a better world for the child to see than what he sees in the ghetto itself, do you feel yourself that just as we have been talking about seeing only white children in these books, do you think that it is sound pedagogically that he sees only black children with the very minor exception in your school, or do you think it is better pedagogically that he see a mixture or racial types in a school setting?

A Pedagogically if somehow a real worthwhile balance of races, of culture, as far as pupil personnel, teacher personnel, not only different races but cultural balance, that there be a good admixture of any number of various things, I believe that

pedagogically this may be a more ideal situation than an all-white school or an all-black school.

Q That would be for faculties as well as pupil personnel?

A That would be for faculties as well as pupil personnel

Q And do you think it is important, Mr. Dixon, for school systems wherever possible to try to achieve this balance, both on the faculty level and on the pupil personnel level?

A Now, wherever possible, I don't know what you mean by that, because --

Q I mean where it can be done.

A So this then doesn't include how it is done. You see, what I'm saying is this. A school system can say, OK, we have 50 white children and 50 schools which are mostly Negro, so put one white child in a school, and we have a certain number of teachers -- OK, scatter them around. This is possible. The Superintendent can do this. He can make teacher assignments. All right. I'm bringing this up to say that I don't want to admit to you that I agree with you along this wherever possible line, because there are possibilities of doing a lot of things to create a situation that looks like something that creates a lot of other problems too.

MR. REDMON: If Your Honor please, perhaps Mr. Kunstler could enlighten the witness by suggesting what he means where possible this could be effected.

days when we have assembly programs or other special events, they take part as well as the others. So the classrooms are separated by walls in all cases, and a classroom's association with another classroom meeting behind some other wall, you see -- Well, this kind of association would be the same.

Q I understand. So what you really meant by the term "mainstream" was where there are any common situations, like a lunch room or an assembly, that the children are all in the same place?

A This is true.

Q Now, with reference to the field trips which you discussed, you indicated you had about \$700.00 for field trips during an academic year; is that correct?

A Yes.

Q Can you give me some idea of where the field trips are taken and of what nature they are?

A The field trips are taken under the supervision of, generally, the language arts teacher, the classroom teachers involved with the classes that go on the trips, and some parents whom we can get in for additional supervision.

As far as places we go, we go to the airport, downtown in the shopping district, the nature center, the public buildings tour, which at one time we can hit the Capitol, the Monument and the White House, MacDonald's Farm and the

University of Maryland Farm --

Q The Zoo?

A The Zoo, yes. The Wheaton Regional Park, Storybook Land, the Wax Museum, the National Gallery of Art, among other places.

Q I know you can't exhaust everything. Now, does every child in Montgomery make at least one field trip a year?

A Up until last year, every child at Montgomery or Morse did not make at least one field trip a year. During the past year, however, every child in both Montgomery and Morse made a number of field trips during the year, because I had an additional \$5,000.00 that I asked for for this particular purpose. We got the funding and everybody in the school made several field trips, some as far as Williamsburg, the Luray Caverns, etc.

Q Where did that \$5,000.00 come from?

A This, again, is E.S.E.A. money that I was able to secure by way of the Model Schools.

Q It came through the Model School Program, isn't that correct?

A This is true.

Q And that is not available to all of the elementary schools, is it?

A No.

the one class that was particularly interested in this field trip made the basic arrangements for the trip, we could get a 4th grade class or a 5th grade class or some other class, you see, to go along with them and take advantage of it. Generally speaking though, it was grades 1 to 3.

Q Now, you mentioned the term "primary basic" or "primary special academic"?

A Yes.

Q Would you define for me exactly what you meant by primary special academic?

A Well, a primary special academic class is a special academic class that is designed for the children, the special academic children, who are in grade 1 through grade 3 and of grades 1 through 3 level.

Q Now, there is no special academic authorized, is there, for the kindergarden classes; is that correct?

A This is true.

Q However, some kindergarden children, as I understand it, do not go into first grade at what would be the normal age time but go into what we call a junior primary; is that correct?

A That is correct.

Q And the junior primary is not by definition, is it, a special academic track?

A No.

Q Now, in your school you have a junior primary, I presume?

A True.

Q Do you know, ordinarily, approximately how many children are in your junior primary? Say last year?

A Last year we had two junior primaries. These two junior primaries came out of four kindergardens.

Q Now, what happened to those --

A May I say this. I am sorry. The junior primary children came from kindergarden, those who were in kindergarden, who, as I explained this morning, seemed to be ready to be a good risk for first grade. At the same time, a number of people don't choose to send their children to kindergarden. So at six years old they present them for instruction for the first time. Now, in the fall when these children are registered in school and are tested, it may be the judgment of the principal to place these children in kindergarden -- I mean in junior primary -- to get some of the readiness work that they would have gotten in kindergarden had they come.

Q While we are on the subject of kindergardens, can you accommodate all the requests you have for kindergarden?

A Last year I was able to; yes. I could not at first.

Q How is it this year?

But they are not placed in special academic class either because this is not where they belong.

Q As soon as space is available will they go --

A And transportation is arranged they will go.

Q Mr. Dixon, as a result of direct and cross examination to this point, I want to ask you, sir, whether you are an advocate or believe in the, so-called, neighborhood school concept?

A I believe in the neighborhood school concept. I think that some of the relationships that we at the school are able to establish with the parents for the good of their children would be impossible in a school which was not in the neighborhood and in close proximity to the parents.

I feel that the parents of my children feel better if they are near home and can do much more for them, as limited, in some cases, as that is, in a neighborhood school.

The fact that even with potential brightness some of our parents have refused to send their children a long way away from home to school is an indication to me that they feel that whatever the advantage of their working with an honors potential class is, it is offset by certain other advantages or certain other pressures that cause them to make this decision.

Many of our children, some seventy-five at this time,

I believe -- it may have changed in the last week -- have free lunch at school. Other children go home for lunch. In many cases the parents are working, even those who go home, but there is somebody in the home who can serve some kind of lunch.

It takes a lot more money to give a child money for lunch or to buy lunch for a large family than it does to have lunch at home if the child can get home for lunch. When there are five or six children in the family, a dollar can feed those five or six children at lunch, whereas a dollar could not feed them at lunch, five or six children, at somewhere other than in the home. So this is a point.

The fact that many of our parents kind of need somebody on a continuing basis, somebody whom they feel is sympathetic and empathetic with their situation and at the same time having a higher degree of education who can help them with some of their problems. Our counselor, for instance, has a lot of traffic in just helping people know where to go to solve some of their problems.

The fact that when parents leave home in the morning and children get sick in school, we can get them back to home to a grandmother or somebody quickly just by walking around the corner with the child by the hand.

The fact that they are not always able to interpret referral blanks given out by the school nurse or doctor, and

they send their children back to school the next day, when the nurse has indicated that the child should be excluded pending some kind of examination, and we have to follow that up with one of our counselor aids, or by the counselor, or the Assistant Principal, or myself, to get into the home in a few minutes to let the parent have some kind of explanation and interpretation of what we mean and what is happening. I think this makes a difference.

The fact that the school is near enough that a baby sitter can be arranged by way of the lady next door to stay with the children for half-an-hour to come to school to have a conference with the teacher, principal or somebody else, rather than taking a half-day with money enough to transport oneself across town to have the same kind of a conference is an advantage.

Q Mr. Dixon, the term "compensatory education", does that have any meaning to you?

A It has a lot of meaning to me. And it is just, simply, that I realize and try to show it in all the things I have gone after for my school, that somewhere along the line, in many ways, we have got to help the child and the family; if possible, compensate for certain shortcomings and deficits they have by way of developing programs which fit where we see children, where we find children, programs geared to the way they live, the things they understand; programs which employ another way to

go, rather than always the traditional approach to teaching, where if a child presents himself for instruction, we use books and papers and pencils and other traditional school materials and supplies; assuming that the child has come well-enough fed, well-enough rested, well-enough emotionally calm to take advantage of what we do in school. So to use a wide range of audio-visual material to continually push toward funds for getting trips out into the world so that we can compensate, in some way, for the child's lack of experience when he was completely in the hands of his parents, and maybe these experiences could be given.

The provision for emphasizing the necessity for cleanliness and respect for property and respect for the other person.

The constant drive toward building a library. Of course, we do have branch libraries all over town. But before we got money for libraries within our school system, we needed to compensate for the child the lack of funds to get down to the library or some other reasons why he may not be able to avail himself of the central branch of the library which is nearest to us.

All these things compensate, in some kind of way, with the compensation that is in the hands of professionals, who have studied children and who have studied education and

sociology and some other things. You know, these things are designed to compensate for some of the shortcomings we find among our children and families.

Q Mr. Dixon, you were asked on cross examination about the circumstances of having some sort of or some degree of cultural balance in a school. Mr. Dixon, as an educator and one who has taught, so-called, ghetto children for over twenty years, would you prefer to see a neighborhood school concept, as you see it in your particular school, or in relation to, for example, moving the children out of the neighborhood to provide some sort of a racial or cultural balance in the school?

A Well, I believe in a neighborhood school. I also believe that we must try to establish some kind of balance, racial and cultural, and a balance, you see, where we can take advantage of as many things that are good as possible. I think that to bring as much of this into my neighborhood to my school is what I would want to do in compensatory programs, maybe in bringing in people who have something to offer culturally and socially and otherwise.

Now, if, however, this has got to be done in some kind of abnormal way that the whole thing is a put-up job, there is no gain, as far as I am concerned.

We were talking about those books a little while ago and what happens in those pictures that show middle-class

suburban life. And it just occurs to me now if, certainly, my children are going to be transported into that kind of a situation to go to school to get some kind of balance -- whatever we are talking about when we say that -- that coming back with frustrations, the frustrations, certainly, would be greater living part of the time in one kind of situation and having to return to another kind of situation, certainly, to me, would be much more frustrating than living and bringing all good things possible into the school community to work with these children hoping that some upward mobility will occur and they will find themselves in, maybe, some of these situations at some time.

MR. REDMON: I have nothing further, Your Honor.

RECROSS EXAMINATION

BY MR. KUNSTLER:

Q Mr. Dixon, do you know the I.Q. cutoff point as far as children in the basic, special academic curriculum are concerned?

A I don't know that there is a real cutoff point.

MR. KUNSTLER: May I have this marked P-2 for identification?

THE DEPUTY CLERK: Plaintiffs' Exhibit P-2 marked for identification.

(Plaintiffs' Exhibit No. P-2 was marked for identification.)

THE COURT: Without referring to the document, does the suggestion that an I.Q. of 70 is the cutoff mean anything to you, without suggesting that this is the only consideration? ✓

THE WITNESS: No, sir.

THE COURT: What is the cutoff? You are the principal of a school and you are knowledgeable in this. To your best recollection now, what is the I.Q. for the special academic?

THE WITNESS: Your Honor, may I say this, that in one of my special academic classes, the current class at the school now, the I.Q. ratings at this time are 55 through 80.

Now, I leave this in the hands of the psychologist. And the psychologist, together with the giving of the necessary tests, etc., writes a recommendation based on a number of findings.

Now, the application for testing, the Form 205, has a great deal of information on it about the child, his teacher's experience with him, family background, attitude of parents, as well as all information possible from his health record, his record in schools he has previously attended, along with his attendance, etc. So the psychologist doesn't go into this cold. He confers with the teacher, he tests the child and he then writes up a recommendation. So when children

are recommended to the special academic class by the psychologist the I.Q. may be just about anything. Not real high, and I wouldn't expect 100 or anything like that, nor 90, but certainly a cutoff where we would say, when you take these examinations or you take this battery of tests, etc., if you are 75 or below, you go into special academic, if you are above we do something else with you. Now, most of them seem to be around 70 to 75, 79, in that 70 range, although I have several right now who are at 80.

THE COURT: By most of them you mean what?

THE WITNESS: Most of the children who are recommended. If we want to take just this one part of the evaluation picture, the I.Q., if you want to take just that one part of it, most of them run in the 70's. Some run in the 80's and some run down well below.

THE COURT: Mr. Kunstler, I suggest that you have that document verified.

MR. KUNSTLER: That is what we are going to do, Your Honor. I would just ask him one more question on it.

BY MR. KUNSTLER:

Q Do you know what the cutoff or what the I.Q. is, as far as the S.M.R's. are concerned?

A No.

Q Do you have any children in the special academic in

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your school now or in the past who are 55 and under in I.Q.?

A I have a child right now who is something like between 50 and 55. I cannot be exact whether it is 50 or 55, but it is within that range.

Q And that child is in the special academic track?

A Yes, at the Morse School.

Q Are there any children in the special academic class now or who have been during your tenure at Morse or Montgomery, who are what you would call emotionally disturbed children?

A I have had, possibly, two cases, if I am not mistaken, where children were tested and placed in special academic class and re-evaluated upon recommendation of the special academic teacher and placed in another placement for emotionally disturbed children; yes.

Q And how long were they in the special academic class?

A A matter of possibly two months.

MR. KUNSTLER: All right, Your Honor, I will defer anything further subject to recalling this witness, if necessary. I will attempt to verify this document as an official document and then indicate that I will offer it as P-2 when we resume our case.

THE COURT: All right.

Mr. Redmon, do you have any further questions?

MR. REDMON: I have nothing further, Your Honor.

THE COURT: I have some trouble, Mr. Dixon. Maybe you can help me. You explained about buying books, as a principal you bought books. And you also indicated that these books came off a list, apparently, approved list furnished to you by the School Board. Am I correct?

THE WITNESS: This is true.

THE COURT: Now, are all of the books used in your school selected by you, as the principal, from such an approved list, or are there some books that you must use for some subjects and some grades?

THE WITNESS: There are no books which we must use; no.

THE COURT: In other words, as far as you know, and using your school as an example, in the District of Columbia School System, the principals of each school select all the books used, all the textbooks used, by the pupils from an approved list of the Board?

THE WITNESS: Yes, sir.

THE COURT: And no particular book is required for any subject in any class in any grade?

THE WITNESS: Not that I am aware of; no. The way we operate is that there is a Textbook Committee that examines books every year, that is the newer books presented by

the book publishers. All of these books must be evaluated by the Textbook Committee, which gives its approval to certain books and disapproves other books.

On our level, in the elementary level -- and I am not familiar with the secondary level -- under the leadership of the Assistant Superintendent in Charge of Elementary Schools, we have one or more meetings during which time the newer books with their newer features and the revisions of older books and anything else that is especially good that needs to be called to our attention. We have several meetings where we discuss these things and see and handle these books. Then at book ordering time, depending on the needs of the school building, in conference with groups of teachers, because most schools have a textbook committee among the teachers, we decide what books we are going to buy.

We try, if possible, to build a program which does a certain thing, that is to, in our case in our basic readers for the regular track, we try to build on a series of books, so that on a continuing basis we are able to get the books, the work books, the supplementary material, like pictures, tests on the stories, so as to build a complete reading program.

Now, there are certain subjects on certain grade levels that our curriculum calls for. On the fourth grade, for

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instance, the study of United States History in social studies -- I mean in United States Geography in social studies. Well, the textbook committee will make recommendations of certain books, but based on your pupil population, you may find that one book on United States History is, in general, too hard for a fourth grade or harder for a fourth grade than another book on United States History is, because the books are published for national consumption; and it is entirely possible that U. S. History in some places would be placed in the fifth grade; so the books are written on a fifth grade level. So these are the kind of decisions that the principals have to make along with the teachers in ordering books.

THE COURT: Now, maybe you can help me on the track situation. As I understand it, the special academic track is ungraded; is this correct?

THE WITNESS: Yes.

THE COURT: That means that in a class of, say, eighteen in an elementary school there may be students from six grades? Well, my point is, how do you know when the child is ready to get out of the school, if he is not going through grades? .

THE WITNESS: Well, two ways. One way is that he may be at some time -- as is quite often the case -- after having been in the special academic class re-evaluated and taken

out of the special academic class and put into a regular classroom. Then he progresses on through the grades the rest of the way to get out to junior high school.

The child may, short of this, be placed out of the special academic class in certain subjects and work in regular classrooms, you see, and come back to his class for certain other subjects. In this way we can find out or establish some kind of grade level.

Although the class is ungraded, we know the grade level, the instructional grade level, of the children who are there in the various subjects. Especially in reading and arithmetic, because using standardized tests, informal teacher tests, based on graded material and graded textbooks, such as these [indicating], you see, we can, although he is in an ungraded classroom, we have an idea of his instructional level gradewise. And this is the most important thing.

Now, the second way he may get out, if he continues to progress at this very, very slow pace, that he just doesn't have the mental maturity to achieve, is that if we look at the record at the end of a school year and find out that this child is going to be 14-years-old by February 15th of the coming school year, he will go to junior high school and continue in a special academic class on the junior high school level. Now, this is some attempt to at least, if the

children are not achieving, to keep them somewhere near their age group, you see.

There may be a range of grades 1 through grade 6 in a special academic class. In many situations there is the opportunity, such as in my case, that they will be in two groups, the little ones, who, normally, would be 1, 2, and 3, and the older ones, who would be 4, 5 and 6, because these are the true traditional divisions of the elementary school grades in the D. C. Public Schools; the primary grades and the intermediate grades.

Even at that, however, you would rarely find a child in even a primary special academic class who is kindergarden age, first grade age or second grade age. Now, he may have been placed there from a second grade, but by and large it's a child who has done kindergarden and maybe junior primary and a trial at first grade, not so successful, possibly second grade and a repeating of second grade, or a repeating of one of these grades, which really puts him at or near third grade age, but his achievement has not gone beyond first grade.

Therefore, we say the primary special academics take care of the needs of children with educational needs first through third.

THE COURT: But, in any event, these children are all in one room with one teacher?

THE WITNESS: Yes.

THE COURT: Suppose a child doesn't seem to be making progress enough to get out of special academics and just stays in until he gets to the age where he should be out, what happens to him, do you just keep him there until he is fourteen in February and then send him up?

THE WITNESS: Yes.

THE COURT: Is that how it works?

THE WITNESS: Yes.

The keeping, now, is not just what it looks like, that he comes in there and works with the same teacher in the same room doing the same thing. We are hoping, just as in these series of books, that if he is placed in there when he is at a pre-primer reading level, that if you figure that it is normal that a child would progress through educational materials at a rate of one grade per year, if he progresses a half grade per year, according to graded material, he is making progress each time he takes up where he left off. And there is always the effort to establish an instructional level where the child ought to be taught and move on up from there. So it is entirely possible for a child who is slow-moving like that and that you do all you can for, and his power to learn and retain is such that he would take time. All right, he would take that time, but surely he doesn't take any more time than he would

have if he were having a succession of failures dealing with the graded method of the regular classroom, where at the end of every year he faces the trauma of being retained or retarded in this class. Or that if he is promoted because of his age to keep him somewhere near his age group that he finds himself in with a strange group, most of whom are working beyond him, and the frustrating competition that he would meet there. So he still spends his elementary years in an elementary school doing elementary school work at his instructional level.

THE COURT: In other words, as I understand it, there is no such thing as graduating from the special academic track to junior high school except by becoming fourteen years old in February; is that accurate?

THE WITNESS: If a child is progressing faster than this would indicate, then he is taken out of the special academic class. In other words, if a child is eight, we don't look forward to his being in the special academic class until he is fourteen.

THE COURT: I understand that.

THE WITNESS: But if this child begins to progress that fast, then he can progress faster than his years do. Then he comes out. And, by the way, I just want to mention that here, again, in our promotion exercises and all the activities around promotion to junior high school that the special academic

children take part. They are subject to all the awards for good attendance and good citizenship and things like that which we give out on that last day of school. They are not separated. Everybody is in according to height, whatever the conformation is for seating, etc. So there, again, they are in the mainstream when they get ready to go to junior high school, although, in most cases, they are going to junior high school to continue special academic work on the junior high school level. There is no discrimination.

THE COURT: Maybe I am not making myself clear.

If a child is in special academic and doesn't get taken out of special academic and put into an appropriate class, a general or regular track, then he stays in special academic. And my question is this: Does he ever graduate directly from special academic to junior high except by becoming fourteen years old?

THE WITNESS: No.

THE COURT: That answers my question.

All right, I have no further questions.

MR. KUNSTLER: I just want to ask him one question that has to do with our P-2.

RE CROSS EXAMINATION [Resumed]

BY MR. KUNSTLER:

Q Do you know who Mrs. Tayman is [spelling] T-a-y-m-a-n?

A I can't place her right now. I have heard that name.

Should I know her?

THE COURT: Well, maybe you can help him.

MR. KUNSTLER: Well, she is one of the Officers in the Special Education or Pupil Personnel Department -- I am not sure -- who has some responsibility with reference to the preparation of our P-2. I am just asking if he knew her.

THE WITNESS: I have heard the name and have seen the name but, frankly, no, I can't place her.

MR. KUNSTLER: That is all I wanted to know.

I have no further questions.

MR. REDMON: I have one more question in light of Your Honor's last question.

REDIRECT EXAMINATION [Resumed]

BY MR. REDMON:

Q Are there times, Mr. Dixon, when a child, for example, when a child in the 5th grade or during the 6th grade, will be moved out of the special academic curriculum so that at the end of his 6th year he will actually be a student, for example, in the regular curriculum?

A Well, this is usually the time when we move the children out of special academics. We call for a re-evaluation by the Department of Pupil Personnel. At the same time, based

on the child's strength, or, let's say, based on the maybe the child's weakness, we will give him as much of a full program in a regular class on the 5th grade level or 6th grade level as he can handle. Now, if this child has got to the point where he can do pretty sound 4th grade reading, we will put him in the 5th grade because of his age and he is moving towards this fourteen years old. So he doesn't have to come up to any kind of standard that we really are not able to maintain with our regular children. So the 4th grade reading level is plenty good enough for him to try out in the 5th grade. It may be that this boy is still quite weak in a number of concepts and needs to be back with his regular class in the smaller group of 12 rather than in the large group for arithmetic. Or he may stay in the regular class all day long and just come back to his teacher for certain things, like physical education or art. But we try his wings as much as we can until I can say to the teacher, okay, special academic teacher, cut him off now, discharge him from your roll because this other teacher is going to take him over completely. And he will move right along with her class and go on to junior high school that way, you see.

Now, we feel that with our additional experience of having had this child over a period of time, having noted and documented his growth, and his increased potential now for

further growth, we would rather do this based on, let's say, 4-years or 5-years that we would have with him and let him go into a regular class, rather than let him go into junior high school in the basic track and hope, right away, very soon, he will be evaluated on the junior high school level and taken out of the basic track there.

MR. REDMON: I have nothing further, Your Honor.

MR. KUNSTLER: I have nothing further, Your Honor.

THE COURT: Thank you very much, Mr. Dixon.

Mr. Cashman, can you tell us something about tomorrow?

MR. CASHMAN: Yes, Your Honor, I can. It is my intention, as soon as the proceeding is finished today, to speak with Dr. Dailey and have him here ready to testify tomorrow morning. Your Honor, Dr. Dailey has been deposed by the other side.

THE COURT: And do you think he will take the day?

MR. CASHMAN: No, Your Honor, I think Dr. Dailey would, most likely, take half a day. Your Honor, we will have, however, another witness to follow him.

THE COURT: Do you know who that might be?

MR. CASHMAN: Yes, Your Honor, a man by the name of Talbert, with respect to the boundaries and the charts that we have here. His name came up earlier in this lawsuit,

MR. CASHMAN: We call Doctor Dailey.

Whereupon

JOHN THOMAS DAILEY

was called as a witness by the defendants and having been duly sworn was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CASHMAN:

Q Doctor Dailey, may we have --

THE COURT: Before you begin, Mr. Cashman, you weren't here yesterday when I asked -- or the day before yesterday when I asked Mr. Redmon when he was putting in his principal witnesses what the present position of the Board was on the track system.

MR. CASHMAN: Yes, Your Honor.

THE COURT: I asked -- you got the message?

MR. CASHMAN: I got the message, Your Honor.

We are preparing the documents that will reflect, we hope to your satisfaction, what the current status is.

THE COURT: That is fine.

BY MR. CASHMAN:

Q May I have your full name, Doctor Dailey?

A John Thomas Dailey. D-a-i-l-e-y.

Q Doctor Dailey, where were you born, sir?

A San Marcos, Texas.

Q Could you indicate, Doctor Dailey, where you went to school, high school?

A I went to the demonstration school of the Southwest Texas State College there in San Marcos, and graduated from high school there.

Q Now, Doctor Dailey, when was that, please?

A 1932.

Q Doctor Dailey, did you ever attend college?

A Yes, I went to the Southwest Texas State College at San Marcos and graduated in 1936.

Q Now, you acquired a Bachelor of Science degree at that time?

A That's right.

Q What were your major fields concerned in the acquisition of that degree?

A History and government and education.

Q There came a time when you got a Master's degree?

A Yes. That was at North Texas State College, 1939, Master of Science in educational psychology.

Q Doctor Dailey, there came a time, obviously, when you acquired a doctorate's degree.

When was that, sir, where was that, and in what field?

A That was at the University of Texas in 1949 in educational psychology.

Q Now, Doctor Dailey, would you give us your current employment, please?

A I am Research Professor of Education at George Washington University.

I am Director of something called the Education Research Project there.

Q Now, can you indicate how long you have been in that capacity?

A I have been there a little over two years.

Q Now, Doctor Dailey, with what is the Education Research Project at George Washington University concerned?

A Well, this is a group that is part of the Graduate School of Education.

Our primary purpose is to carry out a diversified program of sponsored research to give our graduate students a chance to do research with real live data and important situations in education.

We have a number of sponsored research projects that I direct.

Q Would you kindly indicate to the Court -- will you just describe some of the research projects with which you

evaluate some of the data and procedures involved in security clearance.

This involved inventing a code to quantify background data so it could be processed through a computer.

Q Now, Doctor Dailey, prior to your employment in connection with the George Washington University Research Project in Education, what was your association?

A Well for six years I was with the University of Pittsburgh as Program Director for something called Project Talent, T-a-l-e-n-t.

Q Was that from 1958 through June of 1964?

A That's right.

Q What was your capacity with respect to the project you have indicated as Project Talent?

A Well, I was program Director, meaning that I was the senior fulltime person assigned to the project on the staff.

Q I see.

Would you indicate to the Court what Project Talent was.

A Well, Project Talent was a national survey of the talents of American youth sponsored by Office of Education and several other Federal agencies.

The purpose of this was to take a large representative

sample of our youths give them a lot of important tests and other measures, and follow them up to see how that related and how well they did in life.

This is an on-going project that is still continuing. We did our testing in 1960.

In 1960 we tested a half million high school students and gave them two days of tests of mechanical ability, grammar, information, everything you can think of within the state of the art for tests that are given in school.

We did a series of followup studies and related that to whether they went to college, what jobs they had, how well they did, whether they dropped out of school, etc.

Q Doctor Dailey, you said that the Project Talent is an on-going study.

Is there any limit to its duration as it is presently contemplated?

A Well, yes, of course, because anything sponsored by Federal contract -- it is only a contract for two or three years at a time.

It was originally conceived of, however, as a 25-year study where eventually there would be a series of 20-year followups to relate all they learn about them as high school students to how well they were doing in life in society 20 years

after they graduated from high school.

Q Doctor Dailey, do you have any idea of the funding that went into such a project as Project Talent, how much it cost the Government?

A Oh, very substantial. It is probably on the order of two or three million dollars.

The original was a million and a half, perhaps. I understand they have been given another couple of million or so to finance them for another period.

Q Who is the current program director of Project Talent?

A Mr. William Cooley, C-o-o-l-e-y, at the University of Pittsburgh.

Q I see.

Is Doctor Flannagan associated with Project Talent any more?

A I am not sure about his capacity. He has recently moved from Pittsburgh to the West Coast and I am not sure just what his relationship is now to the University of Pittsburgh.

Q Well --

A Quite likely he is associated with it.

Q Now, Doctor Dailey, in connection with the Project Talent studies, were you called upon to create any tests at

all?

A Yes, we were. We developed our own battery of tests, two-day test battery of several dozen tests, with the assistance of an advisory committee of about 30 specialists over a period of two years.

We surveyed the state of the art in aptitude and achievement measurement in this country and with the advice of this advisory committee, we decided what tests ought to be developed for use.

And so we developed these tests. We wrote the items. We tried them out and perfected them and had them ready for use in 1960. This was done under my direction.

Q Are then aptitude and achievement tests your specialty, sir?

A Yes, I would think so.

Q Now, Doctor Dailey, did there come a time when you were associated with the University of Texas as a Research Associate?

A Yes. 1940 through 1942 I was a Research Associate.

Q Was that in connection with examination of statistics for the Testing and Guidance Bureau there?

A Yes. I was the statistician and counselor with them.

Q I see.

Now, Doctor Dailey, does your experience include any teaching?

A Yes. I taught for four years in the public schools of Texas from 1936 to 1940.

Q Did you ever attain a principalship during any of your teaching experience?

A During part of that time I was a principal.

Q Now, would you indicate to the Court what your military experience embraces.

A Well, I spent 17 years working in military personnel work, part of that in uniform and part of it under Civil Service.

I originally started in Civil Service in February of 1942 on the staff of the Office of the Air Surgeon of the Army Air Corp at that time.

I was part of the group that developed the aptitude test, the so-called Stanine, S-t-a-n-i-n-e, test for pilot ability and other air crew ability.

This was done during World War II.

Now, after six months in Civil Service, I was commissioned on the job. I later became -- as a second lieutenant. I later advanced to the rank of major.

In 1946 I reverted back to my Civil Service status, but stayed on the job as a military psychologist.

Until 1951 I was part of the Air Force program that is concerned with the development and use of aptitude tests.

Q What was your participation in that area of that?

A Well, at the end of that period I was Director of Personnel Research Laboratory at Lackland Air Force Base, where the Air Force does its personnel research.

Q Well --

A Now after that I spent seven years with the Navy as a civilian.

Q In what --

A Bureau of Naval Personnel as a Research Director.

Q In connection with what research?

A In connection with research on tests and measurements and training and the like, personnel training research.

Q Now, Doctor Dailey, have you had consulting experience in the area of tests and test measurements?

A Yes, I have. I have been consultant for a number of groups involved in the development and use of tests.

Q Would you just indicate to the Court a couple or three of those associations?

A Well, Educational Testing Service. I was on their

research committee for a number of years.

I have been a consultant to the Department of Defense on such things.

I have been a consultant to several other Federal agencies in regard to the use and development of tests.

And a number of school systems, of course.

Q Doctor Dailey, in connection with the professional societies that you belong to, would you indicate to the Court what they are, as best your memory serves you?

A Well, I belong to the American Psychological Association -- I am a Fellow in that, and former president of the Military Psychology Division.

I belong to the American Education Research Association.

I belong to the National Education Association.

I belong to the American Association of the School Administrators.

Psychometric Society.

Q Doctor --

A And probably several others that don't come to mind.

Q Doctor Dailey, in connection with your association with the American Psychological Association, there are divisions of that association, are there not?

A That's right.

Q And what is the testing division of that association?

A Well, I would say Division 5 is the division on measurements and evaluation.

Q I see.

Now, are you a member of that division of the association?

A Yes, I am a Fellow of Division 5.

Q Have you published any articles or monographs in connection with your specialty area?

A Yes. I published a number of articles and several monographs and reports in this area.

Q Would you just indicate to the Court briefly some of those publications?

A Well, one is something called the Tests in Project Talent. That is published by the Government Printing Office. It is an Office of Education monograph. I think Monograph Number Seven. I wouldn't swear to that, but it is in the Office of Education monograph series.

I was also co-author of, I think, four monographs reporting the results of Project Talent.

I was the author of a report on the research on flight engineer training that was done during World War II.

And then I published a number of articles and short reports.

Q Does the American Psychologist include your publications, Doctor Dailey?

A Yes, it does.

Q Doctor Dailey, are you presently a member of the President's Committee on Mental Retardation?

A Yes, I am.

MR. CASHMAN: Your Honor, at this time the defendants would like to tender to the Court Doctor Dailey as an expert witness in the field of achievement and aptitude testing.

MR. KUNSTLER: No objection, Your Honor. We have no voir dire.

THE COURT: All right. The Court will accept the witness.

MR. CASHMAN: Thank you, Your Honor.

BY MR. CASHMAN:

Q Doctor Dailey, in connection with your presence on the stand today, were you asked by the defendants through me to prepare certain charts?

A Yes, that's right.

MR. CASHMAN: Mr. Clerk, will you mark these charts, please?

THE DEPUTY CLERK: Defendants' Exhibit No. 117
marked for identification.

Defendants' Exhibit No. 118 marked for identification.

Defendants' Exhibit No. 119 marked for identification.

Defendants' Exhibit No. 120 marked for identification.

Defendants' Exhibit No. 121 marked for identification.

Defendants' Exhibit No. 122 marked for identification.

(Chart Reading versus IQ marked as
Defendants' Exhibit No. 117 for
identification.)

(Chart Reading versus Per-Pupil Ex-
penditure marked as Defendants'
Exhibit No. 118 for identification.)

(Chart Reading versus Negro-White
Pupil Ratio marked as Defendants'
Exhibit No. 119 for identification.)

(Chart Reading versus Median Family
Income marked as Defendants' Exhibit
No. 120 for identification.)

(Chart Reading Comprehension versus
Project Talent Norms marked as
Defendants' Exhibit No. 121 for
identification.)

(Chart Reading versus Abstract Reason-
ing marked as Defendants' Exhibit
No. 122 for identification.)

BY MR. CASHMAN:

Q Doctor, I show you what has been marked as
Defendants' Number 117 for identification.

I ask you whether or not that is one of the charts that you prepared at my request for presentation in this law suit.

A Yes, that is right.

Q Now, was that prepared in your office?

A Yes.

Q Was it prepared under your supervision, sir?

A That's right.

Q Did you check, sir, on the accuracy of that chart which is our Exhibit No. 117?

A Yes.

Q Now, Doctor Dailey, I am going to ask you what the various black dots on this chart represent.

A Each of those dots represents one of the elementary schools in the District of Columbia and represents the information for the fourth grade in that elementary school.

Q Now, is this the fourth grade in the entire elementary level of the District of Columbia schools?

A Well, this represents all of the elementary schools.

Q All of the elementary schools.

Now, for what school year is this chart concerned?

A This is for '64-'65 with a testing done towards the end of the year 1965.

Q Now, will you --

MR. CASHMAN: Can Your Honor see the chart completely?

THE COURT: Yes.

BY MR. CASHMAN:

Q Now, Doctor Dailey, this bottom line of the chart represents what, sir?

A This represents the average IQ of the students in the fourth grade in that school on the Otis IQ test.

Q Now, this Otis IQ test was given in the fourth grade in 1964-65?

A In the fourth grade for 1964-65.

Q I see.

Did you check with the District of Columbia testing personnel to ascertain whether or not this was the fact?

A Well, I obtained the data through the D. C. schools in connection with some research studies that we were making on the relationship between school factors and student factors.

Q I see.

Now, Doctor Dailey, the bar that runs vertically on the left here in black from one through eight represents what factor?

A That represents the grade level at which the average

student reads, on the scale, as you can see, running from a low of a little less than three for some schools to about seven -- grade seven for others.

Q We are concerned here with the fourth grade, are we?

A This^{is}/all fourth grade, yes.

Q All right.

Now if I picked out a dot -- and I am pointing to this dot here.

A Yes.

Q Could you indicate for me exactly what this dot means in terms of this graphical representation?

A Yes.

Now that means that the average student in that school had an IQ of about 109 and was reading just below the seventh grade level.

Q Now, if on the other hand, I went to the left-most portion of the chart, as I face it, and I pointed to the initial dot that I encountered, would you indicate to the Court what that dot represented?

A That means that the average fourthgrader had an IQ of about 82 and was reading just about the third grade level.

Q In that particular school?

A In that school. This represents the average student

or the typical student in the fourth grade of that particular school.

Q Now, Doctor Dailey, would you indicate to the Court, please, what the relationship is between an IQ result and reading ability at grade level from this chart?

A Well, from this chart, you can see a very high relationship there, which means that the reading level you are getting is pretty much a reflection of the IQ level in that school.

Q Now, would this be an exceptional experience within your opinion or would this be something to be expected?

A I would say this is typical of most any school system where you are giving a reading comprehension test and also an IQ test of the type that is used.

Q Now would you explain to the Court what this particular heavy coincidence of dots which is located in the left center of the chart indicates?

A Well, this means that a pretty large proportion of the schools in D. C. are very similar in terms of their reading levels and IQ levels and, of course, this is a reflection of the fact that they are similar in many other ways.

THE COURT: . May we find out whether or not any test was given to determine the reading level?

MR. CASHMAN: Yes, Your Honor.

BY MR. CASHMAN:

Q Would you indicate to the Court how we determined the performance at reading level, how that was attained for the purposes of this chart?

A Yes. This is from the reading scale of the Metropolitan Achievement Test, so this is one standardized achievement test versus the other and it means that the average student does relatively the same on one kind of standardized test as he does on the other.

These are both based on standardized test results.

Q Now you said this was the Metropolitan --

A Metropolitan Achievement Test battery.

Q Now would you indicate to the Court when those results were consulted, that is, for what year?

A For 1964-65. They are for the same year.

Q Thank you.

Now, Doctor Dailey, I am going to show you --

MR. CASHMAN: Your Honor, I would like these three -- first three charts to be displayed at once for comparative reasons and ask the Court to excuse me while I see if I can set it up here so it will be visible.

BY MR. CASHMAN:

Q Now, Doctor Dailey, can you see this chart?

A Yes.

Q Now, Doctor Dailey, was this chart again prepared pursuant to my request in your office, under your supervision?

A Yes.

Q Now, will you kindly indicate to the Court what the black dots on this chart marked Defendants' 118 for identification are intended to represent?

A Well, again each dot represents one of the elementary schools in the District of Columbia and in this case instead of relating reading to IQ level, we related reading to per-pupil expenditure.

This is per-pupil expenditure for the corresponding school year '64-'65.

Q I see.

A And you can see the expenditure level at each school and also the reading level.

Q Now, if I were to select the dot appearing immediately above the word "grade" on this chart, would you indicate what that dot means on this chart in terms of per-pupil expenditure and reading at grade level?

A That means they are reading at the third grade level and spending about \$430 a year.

Q Now, if I were to select the dot here, that is, the first dot that appears under the letters R and E on the title of this particular chart, would you indicate to the Court what this dot would represent in terms of the relationship between per-pupil expenditure and reading at grade level?

A That means that they were reading at nearly grade six and a half and were spending a little bit less than \$300 a year.

Q Now, was the grade level determination for the purposes of this chart achieved in the way the grade level was in the chart you explained previously, Doctor?

A Yes, it was.

Q Now --

A Based again on a standardized reading test.

Q Now, Doctor, could you explain what the general spread that occurs between the numbers three and four on this chart extending right-ward as I face the chart over to the block represented by the figures 380 and 420 represents?

A This block that I am generally indicating with my hand?

A Well, this represents a group of schools that are reasonably homogeneous in terms of their achievement level.

You can see they differ a great deal in the amount spent.

There are some of these schools that are essentially the same in reading level, very little is spent -- \$220 or thereabouts; in others you spend up to \$400 or more.

Q Now, Doctor, comparing -- well, first of all, what is your interpretation then from this graphic representation contained in Defendants' 118?

A Well, my interpretation is there is virtually no relationships between per-pupil expenditures and reading grade level for the elementary students.

Q Now, in terms of a comparison between Defendants' 117 and 118, what conclusions, if any, do you draw?

A I draw this conclusion, that if you spend less in a high IQ school, you will get good reading.

If you spend more in a low IQ school, you won't get more reading than is indicated by the IQ.

Q Is it fair to say that the coincidence between intelligence quotient result and reading level is much higher than is per-pupil expenditure and resultant reading level?

A Yes, that is certainly true. One is very high and one is very low.

Q Which one represents the high degree of correlation

and which one represents the low?

A Reading versus IQ is a very high correlation.

Reading versus per-pupil expenditure is very low.

Q Now, Doctor Dailey, I have just put up what has been marked for identification as Defendants' Number 119.

Now, again, Doctor Dailey, was this chart a chart that was prepared in your office under your supervision at my request for presentation in this case?

A Yes.

Q Now, Doctor Dailey, would you tell me what the lower black line on this chart is intended to represent?

A This represents the percent of the students in each school that are white.

Q And the black line that runs vertically along the left edge of this particular chart, what does that represent, sir?

A That represents the reading grade level on the standardized test.

Q Do the dots purport to represent individual schools?

A They represent each of the elementary schools in D. C.

Q Now, with what grade were you concerned in the composition of this particular chart?

A Again it is the fourth grade.

Q Now, what year were you concerned with?

A 1964-65.

Q The reading grade levels, were they attained from the standardized tests?

A Same Metropolitan test.

Q Same Metropolitan test.

And the percentage of white pupils in the elementary schools, how was that derived? From what figures?

A That was derived from figures given us by the Superintendent's office.

Q Now, would you indicate to the Court what would be represented in terms of the data that I am pointing to which is immediately above and slightly left of the letter G in the word grade four on this particular chart?

Would you indicate what that represents, sir?

A That means about 74 percent of the students are white and they were reading just below the fourth grade level.

Q Now, coming across the chart, would you indicate to me what the dot here represents, and I am pointing to a dot that is almost directly above the letter P in percent, that is, four points up?

A There about 37 percent of the students are white and their reading is about fourth grade level.

Q Now, Doctor Dailey, if I were to point to the dot

here that is almost coincident with the black line running vertically on the left side of this chart, and appearing between the numbers four and five, what would that indicate?

A That means that there were virtually no white students in that school and they were reading at about the four and a half grade level.

Q Now, Doctor Dailey, this heavy coincidence of black dots between three and four on the chart, on the left-hand side of the chart, indicates what, sir?

A Well, that indicates that a high proportion of these schools -- a very high proportion of these elementary schools have very, very few white pupils in them.

Q Now, Doctor Dailey, what conclusion do you draw from the total impact of this chart marked 119?

A Well, you draw the conclusion that there is a moderately high relationship there between the percent white pupils and the reading grade level. It is not as high as the relationship with IQ, but some of the schools with a very high proportion of white students aren't reading at a high level and some of the students with a very considerable minority of white students are reading moderately well, but there is a moderately high relationship there between the two.

Q I see.

Now, to what do you attribute that moderately high relationship?

A. Well, I think if you look at the next chart that will become clear.

THE COURT: Wait just a minute while we change reporters.

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BY MR. CASHMAN:

Q Dr. Dailey, is this the chart to which you were referring?

A Yes.

Q This is the chart denominated "Reading Versus Median Family Income."

MR. KUNSTLER: Your Honor, we can't see that.

MR. EARNEST: I am going to hold it.

THE COURT: Mr. Earnest will hold it.

MR. CASHMAN: I am sorry.

MR. EARNEST: Mr. Kunstler?

MR. KUNSTLER: Yes, that is fine.

BY MR. CASHMAN:

Q Now, Dr. Dailey, in order that we can keep some degree of continuity, you were going to say that the explanation of this chart would be helpful in describing the relatively high degree of performance between children at grade level and percentage of white pupils.

A That is right.

Q Would you kindly indicate to the Court how this chart is helpful in the explanation of that result?

A Well, as you can see, there is a very pronounced association in both charts and in my opinion the real

determining factor is family income.

Now, in other data we have on studies we have made, we find that if family income is held constant, race as such is not a significant factor in determining reading-level or achievement level of the students.

THE COURT: Would you ask him to explain this chart.

MR. CASHMAN: Yes, Your Honor, that is exactly what I am going to do.

BY MR. CASHMAN:

Q Now, this bottom line on the chart that is being held by Mr. Earnest represents what, sir?

A That is median family income in the Census Tract that the elementary school is located in as of the 1960 Census, of course. Now, there is not a perfect coincidence between the Census Tract and the elementary schools. Sometimes there may be a couple of elementary schools in the Census Tract. But this does represent the income level in the immediate area served by the elementary school.

This is in hundreds. So 22 means 2200 and 150 means 15,000.

Q Doctor, would you kindly explain the left black bar on this chart?

A The left black bar again is reading grade level.

Q That grade level was, for the purpose of this chart, achieved in the same way as were the others?

A That is right.

Q I see. Now this is, you indicated, from the Census Tract, and that is the Census Tract of 1960?

A 1960, yes.

Q Now, in terms of indicating to the Court, say, for instance, what this dot here, which is in my judgment, as between two, the topmost dot and the rightmost of the two I am making the comparison between, this dot represents what in terms of the relationship expressed on this chart?

A Well, that represents an elementary school that is in a Census Tract with a median family income over \$11,000. The students in the fourth grade in that school are reading just under the seventh grade level.

Q I see. Now, in terms of this almost -- this double dot here, what would that indicate? And this dot is in the square which is four over from the right and three squares down.

Would you indicate what that reveals?

A That represents a pair of elementary schools that are in the Census Tract with a median family income of almost \$10,000. They are reading -- the fourth graders there

are reading at the grade five-and-a-half level.

Q Now, if I were to ask you to address your concern to the dot which appears to me to be the leftmost dot on the entire chart, would you kindly indicate what that represents, sir?

A That represents an elementary school with a median family income in its Census Tract of about \$2900, or so. They are reading at about grade three-and-a-half level.

Q Now this rather concentrated coincidence of dots which I am covering with my left hand, and which is in approximately the left center of the chart, would you indicate what is expressed in that particular concentration, sir?

A It means that a very high proportion of the elementary schools in Washington, D. C. serve low income areas.

Q And how does it relate in terms of their reading level?

How does it relate family income to their reading level?

A Well, it means there is a very definite association between the family income level and the reading level in the schools.

Q Having made that explanation, would you kindly again indicate to the Court how this chart held by

Mr. Earnest is related to this chart over here and the conclusions that you have drawn from both of them?

A Well, the conclusion is this: That when you have a low reading level, it is not primarily because the students are Negroes, if they are. It is because of low income.

Other studies have shown for any given income level the Negro children do just as well as the white children.

Q Thank you.

MR. CASHMAN: Thank you, Mr. Earnest.

BY MR. CASHMAN:

Q Now, Dr. Dailey, I am going to show you another chart which has been marked for identification as Defendants' Exhibit No. 121.

The caption reads, "Reading Comprehension Versus Project Talent Norms."

Now, would you explain to the Court what reading comprehension is?

A Reading comprehension is the same thing measured by the Metropolitan Reading Test. This measures the ability to read a complex paragraph and answer questions about the meaning of what has been read.

It is a standardized test used in Project Talent.

Q I see. Now, the left-hand black bar is rated from

0 to 80, and it is entitled, "Project Talent Percentile."

Will you explain to the Court what that represents?

A This is a percentile scale. It really runs all the way up to 100. The 50 means that the student at that level would be better than 50 per cent of students in general and not as good as the other 50 per cent.

If a student is at the twentieth percentile, that means that he is better than 20 per cent of the norm group but not as good as the other 80 per cent.

THE COURT: What is the universe?

THE WITNESS: The universe can be anything. In this case the universe is defined up here, Project Talent Schools with 30 per cent or more Negro students in these states, which are the Middle Atlantic States.

BY MR. CASHMAN:

Q Would the universe be the total sample?

A It would be the total sub-sample.

Q Yes. Now, in connection with this legend to which I am pointing, would you explain what this legend means to the Court, please?

A Well, in Project Talent we tested 5 per cent of the secondary schools of the country and the results are not published by individual school or by individual state but they

are published by region by the official Office of Education Regions, one of which includes these states.

Now, they also publish statistics for schools classified according to the proportion of Negro students in them, so it was possible to see what the average reading level in terms of national norms would be for those students in those schools in those states who have 30 per cent or more Negro students.

They were at the twentieth percentile. This means as compared with national norms, they would exceed 20 per cent of the students and would be exceeded by 80 per cent.

Q Now, is that represented by the orange bar?

A Yes.

Q Here (indicating)?

A Yes.

Q And the states that were consulted with respect to this chart are what states, Dr. Dailey?

A Delaware, Maryland, New Jersey, New York and Pennsylvania.

Q Now, the series of black bars in generally ascending order on this chart with the names within the dimensions of each bar represent what?

A This represents a representative sample of the junior high schools in the District of Columbia.

Q Now, let me ask you this: You say it is a representative sample. In what sense is it representative, Dr. Dailey?

A It is representative in terms of income level, proportions of the students that are Negro. In other words, this is a controlled sample, controlled on the basis of socio-economic factors primarily.

Q Now, Dr. Dailey, when was the test administered to the schools represented here in the black bars?

A It was given at the end of the last school year in 1966.

Q And what test was that?

A This was the Project Talent Reading Test, the same test that was given in 1960 in the national studies.

Q I see. And that result is represented in terms of the legend here by this orange projection?

A That is right.

Q Now, would you explain to the Court what the impact of the ascending order of black bars in relation to the bar marked in orange "Project Talent" leads you to conclude?

A Well, this means that every one of the junior high schools that we tested in did better than you would predict they would do from Project Talent in terms of the racial composition of the student body.

Q Now, how much better would you say that the District of Columbia junior high schools did on the average than, say, the expectation that would be resultant from the Project Talent survey?

A Well, they would be at about the fortieth percentile, which is somewhat below the 50 percentile but not greatly below. They would be at about the fortieth percentile, which is 20 per cent from the predicted Project Talent data.

Q Now, would it be fair to say in your view that, say, for instance, Gordon Junior High School here, which reaches the sixtieth percentile -- would it be fair to say that if Gordon had a relatively equal number of Negro children and white children in that school, that the excellent performance represented by that graph would be attributable to the racial mixture that would be contained in that school, if such were so?

A I would say, no.

Q In your view?

A Based on our Project Talent research and our

MR. CASHMAN: Your Honor, I think that the witness is entitled to have his full response read to him.

THE COURT: You mean there is more to the answer than was read?

MR. CASHMAN: There is more to the answer, yes.

THE COURT: All right, give it to the witness.

THE WITNESS: Let me make one statement about non-verbal tests. There is no such thing as a non-verbal test as any real entity. There are all sorts of non-verbal tests. There are non-verbal tests that some psychologists have made up that measure perceptual-type things, and non-intellectual-type things and where people who can do well on a complex reasoning test might do well on that kind of non-verbal test.

On the other hand, there are non-verbal tests that have been developed, like this one in Project Talent, and like others which are complex reasoning tests and you find if a low-income group is not doing well on the reading test or similar test they also won't do well on the non-verbal test.

BY MR. KUNSTLER:

Q Let me ask you this: In the Project Talent tests that you were giving --

A Yes.

Q -- that was secondary schools, was it not?

A Grades nine through twelve.

Q Project Talent had nothing to do with elementary children, did it?

A That is right.

Q Or pre-school children?

A That is right.

Q When you deal with Project Talent and compare it to the elementary schools, it is not applicable to the elementary schools, is it?

A Not directly.

Q Is it your testimony then, Doctor, that the verbal tests which you were discussing in your answer on Page 10 are what you would call highly valid for minority groups?

MR. CASHMAN: Your Honor, may I give the full answer so that the witness will be refreshed with respect to the question?

THE COURT: As I understand it, the whole answer to the question was not read?

MR. CASHMAN: Yes, Your Honor, that is correct.

THE COURT: All right, just give the witness the deposition and let him read it.

Do you want to read it? Read it to him.

MR. CASHMAN: I would just as soon read it to him.

THE COURT: Go ahead.

MR. CASHMAN: "There are many Negro groups, for example, who have children who do quite well in school and, of course, these are your middle-class Negro families.

"I would say that race, as such, is probably not the predominant factor in school achievement, but social class is. That is, if children grow up in a home with educated parents and with more than a minimum of income, and if they are stimulated at home, they're likely to respond by being motivated in school in developing these basic skills.

"Of course, it is true that Negro groups as a whole will tend to do somewhat lower on this, but I think it's because of the low socio-economic status and not race as such.

"Now, I would like to say this, though, that this is a very good and scientific and accurate measurement of your primary problem in helping

these groups and is a measure of what you're going to have to do to help them raise their socio-economic status and share in the good things in life through acquiring marketable skills and better jobs."

That is the total answer.

THE COURT: All right, sir.

BY MR. KUNSTLER:

Q Now, Dr. Dailey, in talking about IQ, itself, Intelligence Quotient, I take it that you do not believe that an intelligence test is really an intelligence test but rather an achievement test, isn't that correct?

A Well, you are getting into a very complicated business about what is really an intelligence test. I would say this: For standardized tests that are called intelligence tests, what they measure is a developed skill as of that time the children have been able to develop to use words, about vocabulary, about words, about sentences, and the like. If you mean by an intelligence test their real inborn, innate intelligence, I would say this sort of intelligence test certainly doesn't measure that.

Q Then it measures achievement, the acquisition of skills?

A That is right.

Q Correct. I would like to ask you whether you feel that the Otis Test, for example, adequately samples the skills of minority children?

A I think it does a very good job of sampling the skills of minority children that they have to develop if they are going to emerge from poverty and be competitive in our society.

Q So what you are saying is that it measures the absence of skills, does it not, which they will be required to have if they want to compete in the American Society?

Isn't that correct?

A No, I would not say it measures the absence of skills because many of these minority groups do very well on that test. Some do not do well at all, some do intermediate. I would phrase it positively. It measures a very well defined skill that is fundamental to emergence from poverty.

Q All right, let's take the ghetto child, for example, forgetting race. Put that aside for a moment. Put him in the lowest socio-economic group.

Let me withdraw that and ask you this for a moment. Have you compared the language of the ghetto Negro child, for example, with the language of any other type of child,

~~A~~ That is right.

~~Q~~ And, therefore, if English is not his language, standard English, but some argot and dialect is his language, then he would do much better on the test or at least better -- I will leave out the word "much" -- he would do better on the test than if he was given the test or had taken the test in standard English?

A That is right.

Q Therefore, any results that you got from the tests, if given in standard English, would not be accurate results of this pupil's achievement as compared to the other test?

A No, I would strongly take the position that an achievement test in standard English measures achievement in that language and this is one of the things we need to know about low-income youth, to help them, to advise them,, to help give appropriate school programs for them.

I would say it is not a dialect in any sense. If you take a boy that is very adept at his slum dialect but can't handle standard English, he is going to be handicapped in training programs and in life in general.

Q Let me ask you this then: Do you think that use of the test in some language other than his own language and

A But it is a language test.

Q We realize words are used, but they are the words of the child with which he is familiar?

A Yes.

Q Then I am saying if that test had been administered rather than the Otis Tests, the results of which you had accepted here, would not this Chart 117 be different?

A Yes.

Q In your opinion?

A Yes.

Q Now, Dr. Dailey, isn't it true that what you are saying about the Otis Test, in that it measures a skill and it is a skill which the child needs to be successful in American life --

A Yes.

Q -- aren't you really just saying that in order for American children to be successful in American life, whatever race or ethnic group or socio-economic group they belong to, they need to know standard English and grammar?

A That is right.

Q That is really what it comes down to, isn't that it, in essence?

A Yes.

Q Now, would you say, as a test expert, that the Otis Test is a good test for children who score at its lower end as against children who score in the middle?

A Well, depending on how low you go. It wouldn't be appropriate for diagnosing mental retardation but I say it ought to be fairly satisfactory for use with such children as this who aren't as rapidly developing as others.

Q But in order for these children in the lower ranges to do well on the Otis Test, they would have to have a command of the English language certainly sufficient or co-equivalent to the standardized group which standardize the test, isn't that correct?

A Yes.

Q And if they were considerably different than the standardized group, you would expect much lower or lower results, isn't that correct?

A Yes.

Q If they were in a much lower socio-economic category, for example?

A Yes.

Q Talking about standardized tests for a moment.

A Yes.

Q I understand it is your opinion that local norms

are highly desirable where you have populations considerably different from the test population?

A Yes, local norms and special-type norms are valuable.

Q Now, you have studied the Washington, D. C. school system, have you not?

A Yes.

Q And I might ask you one question about that. Did you find any school system across the country in any of your tests, whether it be Project Talent or any other in which you have been involved, which was like the Washington school system on a racial admixture today, 93 per cent Negro or 90-plus per cent Negro as against 10 non-Negro?

A No, I would say there are not any as extreme as that.

Q This is a unique school system, is it?

A Yes. ✓

Q Now, just to look at 117 again, to get back to it, I wanted to know why you selected the fourth grade as your grade level?

A Well, this just reflects the availability of tests routinely given in the D. C. elementary schools. They concentrate on grade four and grade six and these particular

Q You know the difference between ADA and ADM figures, do you not?

A Yes.

Q And is it your opinion ADM figures would be higher than ADA figures?

A ADA figure would be higher, wouldn't it?

Q I don't know. I am asking you the question.

There has been testimony in this lawsuit that the ADA would be a lower figure than the ADM figure.

A Per pupil expenditure for average daily attendance instead of average daily membership?

Q Correct.

A I would have to refresh my memory to be sure on that.

Q But, in any event, there would be a difference between which figure you use, isn't that correct?

A Yes, but no difference that would have anything but a general picture you get on a chart like this.

Q All right. You say the ADM figure would present the same pattern as the ADA figure?

A Yes.

Q Now, to repeat the question which I started with

you before we went off into the figures themselves, would you not say from this chart, as you look at it, that as a general rule from what the chart shows that the reading level tends to increase as the per pupil expenditure goes up?

A Well, if you compute a coefficient correlation, there will be a very low positive correlation there between reading and per pupil expenditure, but it becomes zero as you hold income level constant. But there is a very low positive correlation there if you want to examine the coefficient correlation on it.

Q Well, let us leave income out, because income is not a part of this chart. So I am just asking you the question, to put it in my own simple language, would you not agree that from your chart that as per pupil expenditure goes up you have more schools above the fourth grade line than you have when it is lower?

MR. CASHMAN: Your Honor, I think the witness has already answered the question that was put to him by counsel. He indicated that if it were figured out on a coefficient correlation it would register a very low correlation.

Now in terms of pointing out dots on the chart,

I think the dots speak for themselves, Your Honor. I think we are repeating the testimony here.

THE COURT: I think the witness testified on direct examination, as I remember it, that there was very little correlation between the two, and I think counsel is attempting to show that perhaps there is more than he first thought.

Now, Doctor, suppose you just tell us what your conclusion is with reference to this particular matter.

THE WITNESS: My conclusion is that there is a very low correlation here.

THE COURT: By a very low correlation, you mean what? Is this a positive, negative, or what does it mean?

THE WITNESS: It is a very low positive correlation there, that the reading is very slightly better in schools that are quite a bit more in per pupil expenditure.

THE COURT: All right, sir.

BY MR. KUNSTLER:

Q When you say very slightly better, that term does not apply in the 420-460 range, does it, where you have eighty percent above and twenty percent below?

A Well, I would stick by my testimony that this is a chart illustrating a very low positive correlation.

A Yes.

Q Now are you prepared to say that low socio-economic groupings of Negro children, is it your testimony that race is immaterial? And when I say race, I mean by race, just to define it, all the factors, psychological and otherwise, that go into the makeup of the Negro child with which I assume you are familiar.

A It seems to be immaterial in this sense, that if you get white children who come from homes that don't stimulate them, they are poorly educated and low income, you find that they don't respond well in school.

If you find Negro children who are stimulated well at home, they respond well in school.

Q Well, do you find any difference between the Negro idiom that the Negro ghetto child has and the idiom which the white ghetto child has? Have you made any comparisons of these two?

MR. CASHMAN: Your Honor, may we learn what counsel means by idiom?

THE COURT: Will you explain that.

MR. KUNSTLER: I will use the term dialect which the Doctor has used.

THE COURT: Yes, he understands dialect.

school.

Q Let's see what you did study, because what you studied is not illustrated in these charts, is that correct?

A Yes.

Q Let's take what you studied and let's list them all and see how that would affect these two charts.

A Yes.

Q You took age of school, I presume, is that correct?

A Yes.

Q And what else did you take?

A How overcrowded the school was, whether they had a library in it, per pupil expenditure, how many of the children had free lunch, how many were in different special programs and the like.

We also had the crime rate in the Census tract, we had the educational level in the Census tract, and we had several other Census variables.

Q Let us say we take all of those things, maybe even more that you have forgotten or that I don't know about. Let's take all of those and throw them into this chart. I am asking you to imagine at this moment that

we have thrown them all into this chart.

What difference would they make on the placing of these dots in both of these situations, if any?

A Well, actually, not very much. Now let me speak to the point of studies we made of what does predict how well the school will do. You find that foremost, the most important predictive factor is the average income of the families. You find actually that very little adds very much of the ability of family income by itself to predict school performance.

We found that such things as overcrowding of the building, the age of the building and the like had very little to do with it when you hold these things constant, that the primary determiner of how well children do in school ~~seems to be the~~ median family income situation. And this means that if you have a school serving low income parents, you will expect overwhelmingly poor performance regardless of how much is spent or the size of the classes or the age of the building or whether it is crowded or not.

Q Why can't you make the opposite assumption, Dr. Dailey that the blacker the school gets that the worse or lower the reading levels are? Why isn't that just as valid an assumption as your assumption?

and this makes the per pupil costs go way up.

Q Let me ask you this, Dr. Dailey, while you are on the subject of overcrowding. Was it not true in your study of the numbers of pupils in the various schools that there was a correlation between overcrowding and the predominantly Negro schools?

A That is true.

Q But you reached the conclusion that that has no effect on the education of the children or the reading levels of the children?

A That is right. In cases where the schools are serving children at a given income level, the achievement is the same regardless of the degree of overcrowding.

Q Doctor, you are not an educator, are you, in the professional sense?

A I am a research professor of education.

Q That is right, but your experience has all been in the area of testing, has it not?

MR. CASHMAN: Your Honor, this is an obvious oversimplification of the testimony that has already been given.

Now I put this gentleman on the stand as an expert in a particular area.

MR. KUNSTIER: Your Honor, can you hear me without this?

THE COURT: Yes.

BY MR. KUNSTIER:

Q The persons selected were then administered the test, is that correct?

A That is right.

Q Now, when you say a random sampling, what grade were they from?

A They were from the ninth grade.

Q All from the ninth grade at each one of these schools?

A That is right.

Q And then when these tests were scored, you found that these random selections in the various junior high schools in the City of Washington were scored, with one exception, Terrell, they scored much above, the lowest almost 8 per cent approximately, and the highest some 30 per cent above the total school populations of the test schools in the other areas?

A Right.

Q Now, did you correlate the Project Talent scores that these students received with their achievement scores,

would be pretty much like Gordon, maybe higher. That it would be way up at the end of the scale since it is a very high income area.

I would also think that if you picked all around the District and got a group of Negro students of the same income level as Deal, you would get pretty much the same sort of result.

Q Now, Gordon, as of 1965, October 21, '65 -- reading from our P-4 -- had 506 whites and 447 Negroes.

A Yes.

Q Very close to fifty-fifty. In your opinion, does that have any bearing whatsoever on the fact that that school is up to 60 on the percentile?

A I doubt it, if the family income is held constant. I would predict from the dynamics of the situation in the District of Columbia schools that a junior high school that is fifty-fifty or that near balanced probably has Negro students with a considerable proportion of white-collar there. It just usually breaks that way.

Q In all of your discussion here this morning and this afternoon, you used the word, "constant," if income is held constant, and the like.

I wanted to ask you whether you considered in your

figures whether teaching quality was held constant, what effect that would have?

A Well, in so far as you can measure teaching quality, which you can't really, you can almost ignore it without any effect on the results you get in these statistical studies.

I think that is probably largely because nobody can recognize real teaching quality. But it means that one group of teachers in one school probably averages out to be about as effective as the other.

Now in these studies we have attempted to measure teacher quality by such things as -- if you are considering different school systems, you can consider how much you pay them, and compare that. Of course, in D. C., they pay them the same.

We consider things like the experience of the teachers, the amount of academic training they have, and what not. None of this seems to have much relationship to the results you get.

Q It is true, is it not, that outside of statistically comparing such things as experience in teaching and B.A's, and M.A's and Ph.D's, and salaries, and the like, that it is statistically impossible to measure the teacher's quality

outside of those factors as a teacher?

A I think that is true and the corollary is this: Since it can't be measured, principals can't measure it either, so the teachers that happen to assemble in one junior high school as compared to another probably don't differ very much. And you have something that seems to me to be like a random collection of teachers in each school.

Now, the teachers in one school system can be better than another, and I am sure that sometimes you end up with better teachers in one school than in another. But I doubt if it differs a great deal in the real ability of the teachers, because I admit that we researchers can't really measure teaching ability, neither can the principals and neither can the people who hire the teachers in a precise way.

I doubt if you find the teachers in any one school are very much better than the teachers in another school in the District.

Q You are talking about statistically?

A I am talking about statistically.

Q Would you agree with me if there was some way to test, adequately test teacher qualifications, it is possible you might find some schools had better teachers than other

language they have been exposed to, they have developed a very appreciable amount of skill. And that furthermore, some of them don't do it; some do it. You find that mental retardates, for example, are very poor on my test. And it shows a lot of promise in a new way of diagnosing mental retardation.

I think that probably they will learn to read later proportional to how well they learned to do this language facility in their own language, if they have an opportunity to acquire these language skills.

Now, having that equal opportunity is about 90 per cent being fortunate enough to have a home where standard English is spoken during the formative years. .

Q Well, have you made any study yourself of the effect on these low-income children of being placed in a school which would be, say, a middle-income school?

A No.

Q Do you have any opinion from your analysis as to what the effect would be if you took children from a low-income school and placed that child in a middle-income school?

MR. CASHMAN: Objection, Your Honor. I think from the witness' previous answer that he has not considered the

matter, that to ask his opinion on it is completely improper.

THE COURT: Well, I thought the previous question was whether or not he had made any study.

MR. CASHMAN: That is right and now his next question, as I understand it, Your Honor, is, do you have an opinion as to what would happen if a child were so placed.

THE COURT: An expert can have an opinion without having made a study.

Do you understand what we are talking about, Doctor?

THE WITNESS: Yes, sir, and I am willing to give an opinion.

THE COURT: You are. You feel qualified to give an opinion?

THE WITNESS: If you accept it as my opinion.

THE COURT: All right. I will overrule the objection.

Give your opinion.

THE WITNESS: My opinion is it wouldn't help much because it is far too late, that the basic habit patterns have been fixed during the formative years and that it probably wouldn't help a great deal. What would help is to

go into the home and help those parents learn how to stimulate their children better and help teach them language better, and if that were done during ages two and three, and the like, it would make a big difference and we are actively engaged now in developing materials to do that.

I think most of the things you do after a child is of school age, eight, nine or ten years, he has already learned all the wrong ways of using the English language and it is very difficult to have to unlearn those mistakes and then teach them English in a way that they can be competitive in a job situation.

BY MR. KUNSTLER:

Q Dr. Dailey, have you studied any of the projects, and I will mention Syracuse, New York, just to mention one, where children from low-income schools have been transferred, bused into middle-income schools as to what happens to their educational progress after a year, two years and three years in those schools?

A No, not that one.

Q Have you studied any of them?

A I have read some of the reports.

Q What cities have you read reports about?

A Well, I have some familiarity with some of the

Q Now, would you indicate to the Court whether or not you are presently in the process of acquiring local norms for the District of Columbia?

A Yes. My group is as a by-product of what we call the development of a statistical model of the District of Columbia school system. The purpose of this is to help evaluate the results that they get from their new programs under the elementary and secondary education act.

All these data that we have been talking about are part of that statistical model and the purpose of giving the Project Talent test was to establish the base line for this statistical model.

What we are going to do, in effect, almost is to have a special norm, specific to each student, and all that is known about him in terms of his background, his prior record, and so on, and we will have a norm to know what to expect of him. Not just a norm of what to expect of every child in the United States or average child in the United States or the average child in the District of Columbia or even the average low-income child in the District of Columbia.

We will have a norm of what to expect in terms of dropping out of school or achievement, and so on, for

each child, considering all the things that we know about him. If he comes from a well-educated but low-income family, that will be cranked into the expectations and so we will have a prediction of just what to expect of each child in the country.

Now, this is a step forward to what you get in a very gross way from what we call local norms or special norms. Now we will have both the conventional types of local norms and something that even goes a great deal farther than local norms, I think, as soon as we finish running our material through the computer, and that will be in about three months.

Q The District will have the norms that you describe in about three months?

A Yes.

Q Now, when were the plans set in motion to acquire these local norms as part of the statistical model for the District that you have described?

A About a year ago.

Q Now, sir, you indicated that we will have more than just city-wide norms, is that right?

A That is right.

Q There is a further breakdown?

Q Then, when the District acquires these norms which you have indicated will be in about three months, what will be the District's position with respect to other large cities in the possession of local normative standards?

A I think as far as I know we will be more advanced than most comparable school systems in terms of the flexibility of the normative standards we have on students.

MR. CASHMAN: Thank you, Dr. Dailey. I have no further questions.

RECROSS-EXAMINATION

BY MR. KUNSTLER:

Q When you were talking about local normative standards you were not talking about local normative standardized tests, are you?

A Yes.

Q Oh, you are. Those are going to be local normative standards for the Stanford-Binet tests and local normative standards, or local norms for all of the tests, is that correct?

Q And those local norms are going to be predicated on each individual student -- that is, you are going to create local norms for each student?

A That's right.

Q Then, is it going to mean that there will have to be other standards at least once during the school program, or

as soon as it becomes available to us.

THE COURT: All right.

MR. KUNSTLER: There was one other thing, Your Honor, which I thought Mr. Cashman might be in a position at this moment to indicate.

The Court asked on page 2802 and 2803 of the record for a verification by the defense of whether Exhibit 52 was based on the 1960 Census figure for the District of Columbia and Mr. Cashman said:

The total population, I believe, is related to the 1960 Census figures. I will take the Court's admonition and I will verify that.

I want to know whether that has been verified.

MR. CASHMAN: Your Honor, I have overlooked checking on that. I am going to have it checked right now.

THE COURT: All right.

MR. KUNSTLER: The only other thing I have marked, Your Honor, is on page 2852 and 2853 of the record. Mr. Redmon indicated that he would check and see if the -- on the availability of the figures of how many Negro parents took advantage of the optional zone to send their children to Ballou. Mr. Redmon said: We will check and see if they are

MR. CASHMAN: May I see it, Your Honor?

THE COURT: Surely.

Let counsel see it.

MR. KUNSTLER: Yes.

THE COURT: All right.

(Mr. Kunstler shows to Mr. Cashman)

BY MR. KUNSTLER:

Q Now, Mr. Hobson, you also referred to some other exhibits.

I want to show you --

MR. KUNSTLER: May I have marked, Mr. Clerk, F-8 and F-9 for identification?

THE DEPUTY CLERK: Plaintiffs' Exhibit F-8 marked for identification.

(1964-65 Expenditures per pupil for elementary schools marked as Plaintiffs' Exhibit F-8 for identification.)

Plaintiffs' Exhibit F-9 marked for identification.

(Same as F-8 only for junior and senior high schools marked as Plaintiffs' Exhibit F-9 for identification.)

BY MR. KUNSTLER:

Q I show you F-8 and F-9, which are respectively the per pupil expenditures for 1964-65 for the elementary schools, which is F-8, and the same for the junior and senior high

schools, which is F-9, and ask you if you consulted those in the preparation of your chart?

A. (Examining)

No, I did not consult these documents in the preparation of my chart.

I didn't deal with the junior high schools and the expenditures per pupil that I used for the school year 1964-65 came from -- just one second.

I am sorry. Yes, I did refer to F-8.

Q. F-8?

A. Right. That is where I got these.

Q. F-9 refers to the junior and senior high schools which are not on your chart?

A. I did not use F-9.

Q. All right.

MR. KUNSTLER: Then, Your Honor, I would like to offer F-8, which is also a District of Columbia document.

BY MR. KUNSTLER:

Q. Now, while counsel is looking at F-8 and P-5, I will hand you back V-20, and ask you what that chart purports to be.

A. V-20 again is called Selected Data on District of Columbia Elementary Schools in the School Year 1962-63.

The source of this chart is Plaintiffs' Exhibit P-7,

AFTER RECESS

MR. KUNSTLER: Your Honor, we will call as our next witness Caryl Conner. I might indicate, Your Honor, that this is not a rebuttal witness. We left in the record, if Your Honor will recall, an opening to call her when I indicated there had been just issued a report with reference to the number of failures in the Armed Forces among Negroes from the District of Columbia taking the Armed Forces AFQT, the Armed Forces intelligence test; and the record will bear out that we indicated that we would hold the record open, and Your Honor gave us permission to hold the record open for Mrs. Conner who was not available then.

Thereupon,

CARYL CONNER

was called as a witness for the plaintiffs and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KUNSTLER:

Q Mrs. Conner, will you state for the record by whom you are employed?

A By the Department of Health, Education and Welfare in the Office of Education.

Q And what is your position?

A I am the managing editor of the magazine, the American Education.

Q Would you give your name for the record and spell both your first and last name?

A My name is Caryl, C-a-r-y-l, Conner, C-o-n-n-e-r.

MR. KUNSTLER: May I have this marked A-34a.

THE DEPUTY CLERK: Plaintiffs' Exhibit A-34a marked for identification.

(Copy of American Education magazine, October 1966, was marked Plaintiffs' Exhibit A-34a for Identification.)

BY MR. KUNSTLER:

Q Now, you mentioned the magazine, American Education, and I ask you, is this document A-34a, a copy of the American Education?

A Yes, it is.

Q And what is American Education?

A It is the official journal of the Office of Education, the only regularly published periodical that represents the Office.

Q And how often does it come out?

A Ten times a year.

Q Now, I have shown you the issue for what month?

A October.

Q Of what year?

A 1966.

Q And I call your attention to an article called, "How Good Are Our Schools?" and ask you whether you are one of the authors of that article.

A Yes, I am.

Q And who is the other author?

A Richard de Neufville.

Q And who is Richard de Neufville?

A Richard de Neufville was the White House fellow attached to Secretary McNamara last year. He was previously a national merit scholarship winner and National Science Foundation scholarship holder for four years, both scholarships four years. He is presently on the faculty at MIT.

Q In what capacity?

A As an assistant professor.

Q In what field?

A Civil engineering.

Q Now, Mrs. Conner, you are not an expert in education?

A No, sir..

Q And I want to call your attention to the chart which appears, I believe, is it page 9?

A I don't know which chart you are referring to.

Q On page 9 of the October 1966 issue of American Education, and I am referring only to that chart which is on the extreme right-hand side of the page, which is headed: "Armed Forces mental test failures, 18-year-olds: June 1964-December 1965 study (by percent).

Now that is a chart illustrating what?

A The failure rate on State by State basis with white and Negro breakdowns of an eighteen month study of early examination of eighteen year olds conducted by the Department of Defense as a result of the Manpower Conservation Commission's recommendation to the White House.

Q I wanted to ask you, a failure rate on what?

A On the Armed Forced Qualification Test.

Q Can you explain to the Court just what the Armed Forces Qualification Test is?

A It is an examination administered by The Surgeon General's Office of the Department of the Army, and it is taken by everyone entering or being considered for entry into the Armed Services, all branches of the Armed Services.

MR. KUNSTLER: Thank you.

BY MR. KUNSTLER:

Q Mrs. Conner, I show you A-38 for Identification and ask you if you can indicate to the Court what that document is.

A This is the document received from the Department of Defense which has the white-Negro breakdown, on the eighteen month study of 18-year olds.

Q Does that correspond to the chart on page 9?

A It does, and the only difference is in some cases there are stars on the chart now where the total number of people examined provided a sample so small that we felt the percentage figure was meaningless.

Q Now, with reference to the chart which appears on page 9 to which we have already made reference to, would you indicate, and I might say that I am just asking now for mathematical ranking, no opinions whatsoever, in percentages of Negro failures on the AFQT, would you indicate what the, say, ten jurisdictions which have the highest numbers of failures are?

MR. CASHMAN: Your Honor, I have an objection to the question on the grounds that it is not relevant.

THE COURT: The objection is overruled.

THE WITNESS: By jurisdictions--

BY MR. KUNSTLER:

Q I mean by States or the District of Columbia.
That is what I am referring to as a jurisdiction.

A Did you ask me for the highest failure rate
among Negroes or the total failure rate?

Q I am asking you for the highest failure rate among
Negroes.

A The District of Columbia, South Carolina,
Mississippi, North Carolina, Tennessee, Louisiana, Virginia,
Alabama, Georgia, Arkansas, and Florida.

Q Now, I notice in looking at the chart that Nevada
and Arizona list 68.2 for Nevada and Arizona 68.1. Would
you include those among the highest percentages?

MR. CASHMAN: Your Honor, I understood that this
witness was going to be asked what figures were displayed
on a particular tabular representation, no opinions, no
interpretations.

Now we have already learned that this table
comes from the Office of The Surgeon General of the Army
and not from the Office of Education.

Now whether or not she would include the figure
in those above the national average on that is of really no

THE COURT: All right. We will wait for Mrs. Conner now.

Mrs. Conner, will you take the stand, please.
Thereupon,

CARYL CONNER

resumed the witness stand.

CROSS EXAMINATION

BY MR. CASHMAN:

Q Mrs. Conner, I am going to show you Plaintiffs' Exhibit A-40 which has been marked for identification; and apart from the covering letter, I am going to ask you to describe to the Court what is in that exhibit.

A It is a typed copy of a manuscript which, I think, was either the last or the next to last version of the article called How Good Are Our Schools.

Q Yes. Now the article called How Good are Our Schools is the article that appears on pages 1 through 9 of the October issue of American Education, isn't it?

A Yes.

Q Now, can you tell me how many men from the District of Columbia were examined in connection with the table that is on the rightmost side of page 9 of your article?

A Yes.

Q All right. How many men were examined?

A What I have the table on, Negroes, right?

Q I asked you if you know how many men were examined.

A Yes, I have that information here, but it is not in evidence. Do you want me to give it to you now?

Q Yes. Can you tell me, please?

A Sure, 2,054.

Q And of that number, how many were Negro?

A 1,625.

Q Now, can you tell me how many men from the State of Colorado, how many Negro men were examined?

A 42.

Q Now, you say 42?

A That is right.

Q And the figures for Colorado are contained in the table, are they not, to which we are making reference, the table on page 9 that has been offered?

A The percentage figures?

Q Yes.

A Yes. I don't know. I assume they are, aren't they?

Q Do you have a copy of that before you?

A Yes.

Q Please pull it out. Kindly refer to the table that has been offered to this Court.

A Did you ask me a question? I am sorry.

Q What I asked you was whether or not with 42 men I believe you said as the Negro sampling in Colorado, whether the Colorado percentage figures are in the table offered to the Court.

A Yes.

Q Now, would you kindly refer, please, to Nevada, and will you indicate to me how many Negro men were examined in connection with that percentage breakdown?

A 85.

Q Now, in connection with the State of Kansas, would you tell me how many Negro men were examined?

A 170.

Q In connection with Montana, how many Negro men were examined?

A I can't find it. One.

Q Now, I ask you if there is an explanation at the bottom of the chart, the tabular chart we are referring to, that makes reference to "too small--figure meaningless"?

A Yes.

Q And what kind of a representation is that on the

chart? What on the chart means, "too small--figure meaningless"?

A Two stars.

Q All right. Now, with respect to Montana, do those two stars appear?

A No, and they certainly should. I would like to go back and change it.

Q With respect to Kansas, do they appear?

A No.

Q With respect to Nevada, do they appear?

A No.

Q With respect to Colorado, do they appear?

A No.

Q Well, did I ask you any more than those States?

A I really don't remember.

Q I don't myself. Now, consulting that tabular chart again, if you will, please, would you indicate to me how many Negro men were examined in Mississippi?

A 3,685.

Q North Carolina?

A 3,560.

Q Tennessee?

A 1,261.

Q Louisiana?

A 3,710.

Q Virginia?

A 2,984.

Q Alabama?

A 3,454.

Q Georgia?

A 3,037.

Q Arkansas?

A 1,070.

Q Florida?

A 3,257.

Q And again, the District of Columbia?

A 1,625.

Q Now, of the ones that I just read, the group I just read you beginning with South Carolina, and concluding with Arkansas, I am going to ask you if the District of Columbia did not score better than all those States in terms of the Negro achievement on this particular examination.

A The District of Columbia Negro failure rate was not as bad as the deep South States.

Q And of the States that I just indicated--

A All of which were the deep South States.

Q Now, in terms of the national average of Negro failure on this AFQT test across the country, what was the failure rate among Negroes across the country?

A 67.5. /

Q And, therefore, the District of Columbia was below the national average as far as failure rate among Negroes is concerned, is that correct?

A It was. I think you have to bear in mind the bulk of the Negro population is in the deep South.

Q The bulk of the Negro population is not what I was asking you. I was asking you whether on a national scale the District of Columbia did better than the national average.

A Yes.

Q Now, I see that on pages 8 and 9 there are other tables, Mrs. Conner, and I am going to ask you to consider the first table on page 8, which--

MR. KUNSTLER: Your Honor, I am going to object to any testimony that has to do with other charts. We offered one chart, and the testimony was directed to one chart.

MR. CASEMAN: Your Honor, if I may explain the reason for the line of questioning.

THE COURT: I thought perhaps you would like to

Q I wanted to ask you just one or two questions.
How many Negroes were involved in the State of New York?

A 3,680.

Q And what about the State of Illinois?

A 2,123.

Q Michigan?

A 1,374.

Q California?

A I guess that is 1,041.

Q And Pennsylvania?

A Where is Pennsylvania? I can't find it.

MR. CASHMAN: It is the third block up from the
bottom.

THE WITNESS: 1,390.

BY MR. KUNTSLER:

Q Now, Mr. Cashman raised the point about the fact
that, I think, Montana only had one Negro and you have a
figure there of 100 percent.

A Obviously that figure should not be there.

Q I notice you have the figure in parentheses which
you only do for two or three others. Why is the figure in
parentheses?

A There is an editorial assistant in my office who
is a woman named Jeanette Sofokidis. She did the final

proofreading; and to be quite honest, I never looked at the galley proofs myself; and I can't really answer the question. I would not myself have done it that way. However, I just did not pay that much attention to the particular detail. I think all those figures should have been starred and eliminated.

Q I notice at the bottom of the page it states small sample, and shows parentheses and uses the phrase small sample. What does that mean?

A Obviously that means the sample is very small. Clearly one person is not a small sample. It is a figure too small to be meaningful. It should have been starred rather than the phrase small sample.

MR. KUNSTLER: No further questions, Your Honor.

RECROSS EXAMINATION

BY MR. CASHMAN:

Q Mrs. Conner, one question. With respect to the figures relating to the District of Columbia, is there any way of knowing from these figures or do you know how much of the sample dealt with children that the District of Columbia had received from the Deep South?

A Of course I don't, but I refer you to Mr. Harris's recent survey.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS W. HOBSON, et al, :
:
Plaintiffs :
:
vs. : Civil Action No. 82-66
:
CARL F. HANSEN, et al. :
:
Defendants :

Washington, D. C.

January 23, 1968

2:00 P. M., Tuesday

The above-entitled cause came on in open court
before The Honorable J. Skelly Wright, United States Circuit
Judge, for hearing on motions to intervene and stay.

APPEARANCES:

In behalf of Plaintiffs:

WILLIAM M. KUNTSLER, ESQ.

In behalf of Moving Parties:

EDMUND D. CAMPBELL, ESQ.

THOMAS S. JACKSON, ESQ.

JOHN L. LASKEY, ESQ.

REPORTED BY:

Mrs. Shirley J. Hatch, Official Reporter
United States District Court for the District
of Columbia

P R O C E E D I N G S

THE COURT: This is the motion for intervention and for stay. Mr. Jackson and Mr. Campbell.

ORAL ARGUMENT BY EDMUND D. CAMPBELL, ESQ.

MR. CAMPBELL: At the outset, if the Court please, and with the utmost and greatest personal respect to Your Honor, which I am sure Your Honor knows I have, I would like to ask Your Honor on behalf of the intervenors to recuse yourself from further hearing of these motions, and to return them to the Assignment Commissioner for assignment to another judge.

I will state very briefly the reason for this request.

These motions to intervene were filed six months ago tomorrow. The argument before your Honor on these motions was heard on July 30, which is one week from six months today.

Your Honor has not -- The Court has not taken any action on the motions during that interim period although the Court has in other matters in the case, and despite the fact that the case is in the Court of Appeals, proceeded to deal with other facets of the case and to modify the existing injunction order.

questions are raised on what Your Honor refers to as economic deprivation as well as racial deprivation; and that Your Honor has, if I may say so, made a new -- explored in a new field -- the right of a District Judge to enter into that area insofar as school administration is concerned.

I know of no other case where that is done.

These intervenors as we will show to Your Honor have a direct interest in that phase of Your Honor's ruling.

They are greatly concerned on behalf of themselves and others for whom they appear on that particular proposition. The fact that there has been no answer to the intervening petition over the period of six months causes difficulty -- administrative difficulty -- in the prosecution of appeals which should have been decided one way or the other in this vitally important question long since.

And, for that reason, as well as for the reasons which have previously been cited in this case, we respectfully suggest that it would be appropriate for Your Honor to recuse himself in this case.

THE COURT: That motion is denied, Mr. Campbell.

When you argued the motion to intervene before this Court six months ago -- you said it was -- you asked for a

With respect to those particular intervening plaintiffs it would seem appropriate -- unless Mr. Kuntsler, or Your Honor -- unless Your Honor feels otherwise, and those allegations not having been denied, it would seem appropriate -- under Rule 8 (d) for the Court to consider those statements as true for the purposes of this appeal.-- I mean, for the purposes of this intervening petition.

If that be so, with respect to the intervening petitioners -- other than Mr. Hansen -- we would have no testimony that we would care to present to Your Honor except to request from Mr. Kuntsler a stipulation, which it is difficult to believe he would object to. And, that is that two of the intervenors, the Reverend Mr. Sparrow, who is in this room, and the Reverend Mr. Jackson who is a proposed intervenor, are Negro Plaintiffs -- the remaining plaintiffs are -- I mean Negro Intervenors. The remaining intervenors are white intervenors.

Before proceeding further, I think it might expedite the matter if we might have a consideration of that proposition from Your Honor and Mr. Kuntsler, because we would not otherwise need to introduce any testimony on those subjects.

THE COURT: All right, sir. Mr. Kuntsler, the suggestion

as the Court understands it is that the allegations in the applications to intervene on the part of intervenors with the exception of Dr. Hansen be taken as true.

The further suggestion is that it be stipulated that the intervenors with the exception of the Reverends Sparrow and Jackson are white.

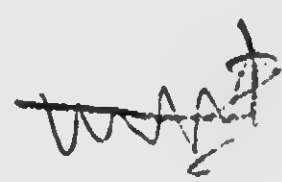
The intervenors, Sparrow and Jackson, being Negro.

This is the suggestion. What is your position?

MR. KUNTSLER: Your Honor, I have no objection to stipulating that the allegations with the exception of the Hansen motion of the various parents as to the fact that they are parents and have children in the public school are true. I reserve the right to question anyone as to what school they happen to be in. That is not indicated. But the bare allegation, what they said, if there is a representation by counsel that these are true facts, I would accept such a representation.

MR. CAMPBELL: I do so represent to the Court.

MR. KUNTSLER: Then, as far as the race of the various intervenors are concerned, I don't know, I believe, either Reverend Sparrow or Reverend Jackson. But, if they represent that they are black Americans I would accept it. It would become apparent if they take the stand.



MR. CAMPBELL: The Reverend Mr. Sparrow is in the courtroom.

THE COURT: Do you know this? Do you represent this to the Court?

MR. CAMPBELL: I represent to the Court the Reverend Mr. Sparrow and the Reverend Mr. Jackson are Negro Americans.

THE COURT: And that the other intervenors are white?

MR. CAMPBELL: And the other proposed intervenors are white.

MR. KUNTSLER: I would so stipulate. I have no objection.

MR. CAMPBELL: With respect to those requesting intervenors, if Your Honor please, we have no testimony we would propose to offer.

With respect to Dr. Hansen, Dr. Hansen is in the Courtroom. Dr. Hansen's intervening petition also sets forth the facts which he contends gives him the right to intervene as an individual. Those allegations have likewise not been denied. If Mr. Kuntzler will stipulate if Dr. Hansen were called to the stand he would testify as stated in the intervening petition, we can dispense with testimony of Dr. Hansen.

THE COURT: Mr. Kuntsler.

MR. KUNTSLER: Your Honor, I don't want to stipulate as to Dr. Hansen. Of all of the motions to intervene his is the only one that states any facts at all as to the reasons for intervention. All of the other motions merely indicate that they are parents and what-have-you, and as to the right to intervene. Dr. Hansen goes through a long discussion of damage to his reputation and so on as his reasons for wanting to intervene. And, while I might say in a stipulation that he would say these things, I think that there ought to be some cross examination on this area of Dr. Hansen's allegations. He makes rather broad allegations, and since these are not pleadings, I didn't deem they have to be answered as pleadings. They are merely motions to intervene. I answered them by moving to dismiss them.

Now that they are back here, I have no objection to him stipulating that he would testify to these things, but I think I would like to reserve the right to cross examine him as to some of them.

MR. CAMPBELL: If Mr. Kunstler will stipulate that Dr. Hansen will testify as set forth in this intervening petition, we will now submit Dr. Hansen for cross examination on these statements.

Dr. Hansen?

May I hand this to him? This is the intervening petition which was filed on behalf of Dr. Hansen, which I am now handing to the witness.

MR. KUNTSLER: Thank you very much.

CROSS EXAMINATION

Whereupon,

CARL F. HANSEN

witness in his own behalf, having been duly sworn, was examined and testified as follows:

CROSS EXAMINATION

BY MR. KUNTSLER:

Q Dr. Hansen, would you take a look at that document which your counsel has just handed to you and tell me if that is the motion to intervene individually and on behalf of other interested persons for the purpose of prosecuting an appeal herein?

A It is the motion.

Q It is? And this is the one that you executed under oath on July 17, 1967?

A That is correct.

Q Now I notice, Dr. Hansen, in looking at it, it indicates that it is on behalf of "other interested persons."

Would you indicate to the Court who those "other interested persons" are, if you know?

A You mean indicate them by name? The leaders by name?

Q I will ask you first, what did you mean by that; and ask you if you do have names.

A I meant by that a rather generic intent to be speaking in behalf of the total citizenry or anyone particularly and specifically injured by the Court's Opinion, without reference to individuals as such.

Q I see. So, you were representing as I understand it, everybody who might be opposed to the Court's decision in the District of Columbia, is that correct?

A I think that would be correct to say.

Q Now, Dr. Hansen, if you will turn to page 2, and look at "A" at the top of the page. You see that sub-paragraph "(a)" which starts off, "His personal reputation in his profession as an Educator and School Administrator has been attacked and damaged by said Opinion and Judgment of this Court."

A I see it. Yes.

Q Is that your opinion of the import or bent of the decree of this Court of June 19, 1967, that it was an attack on your personal reputation?

A This was the lesser intent obviously, of the decision. This is one of the concomitants of the decision.

I certainly do not presume to indicate that the Court would lower itself to be concerned primarily with my reputation as a school administrator, and the intention of the Court was obviously far above that.

Q I see.

Now, can you indicate for the record, how your reputation has been damaged by the Opinion and Judgment of the Court?

A It is a little difficult for me to indicate what others are thinking of me in respect to the decision, but I am certain of this, that interwoven in the Opinion of the Court is an interpretation of my services as superintendent of the schools, my intentions, my motivations, and -- intentionally or not -- the decision in a sense attacks my integrity as an individual and as a school administrator.

And, the newspaper accounts, and in at least one instance a nationally published article on the school system, based in part on the findings of this Court, have in fact made my services in the school system suspect.

I must say again, however, that my reason for being

as an intervenor in this case is not to vindicate myself, but to serve the larger interest of the community on education as a whole, and to protect so far as I am able the integrity of Boards of Education in the operation of schools under legislative authority granted to them , by the agencies that created them.

Q Would you say, Dr. Hansen, that your primary purpose in attempting to intervene in this action was the latter which you just mentioned rather than the former, which is the protection -- alleged protection -- of your own reputation in the profession?

A It is impossible to separate the two factors.

Q Which do you consider the more important?

A I consider them equally important because in large measure, judgments of the Court are based upon administrative actions for which I am responsible.

Therefore, the two are interrelated, cannot be separated in my judgment.

Q Dr. Hansen, you have indicated that with reference to the first, which involves your personal reputation, that there has been -- as you indicated here -- some attack and damage to that reputation.

Can you give us for the record whether these attacks have been from the outside, objective attacks, or whether this is a subjective determination by you of the effect of the decree upon your reputation?

A I can give you a specific illustration if I must be personal. I dislike very much making a public display of my particular personal problems. If I may do this without being asked the question of what school or what institution it is that was considering me for employment, I can give you a specific illustration in which reputation has been affected and may have influenced a negative decision.

If I can spare the institution by name, I will give you particulars. Otherwise, I will not.

Q I will be willing to accept the particulars for the time being.

THE COURT: I don't think that is the question, Mr. Kuntsler. I think Dr. Hansen doesn't want to mention the name of the school under any circumstances.

MR. KUNTSLER: Oh, I have no intention of even asking him that. I say for the time being; I don't mean I am going to come back.

THE WITNESS: I won't answer the question if you ask it.

BY MR. KUNTSLER:

Q The question is, without naming the institution, would you give the specifics?

A Yes. I was -- shortly after my retirement, separation from service here, I was asked if I would be interested in applying for a position on the staff of a reputable highly regarded institution of higher learning outside the city of Washington. I indicated an interest, but as the -- particularly the article in the Saturday Review struck the presses, in which my administration was counted to be a national monument to failure in part based upon the findings of this Court, the interest in my coming into this institution disappeared completely.

Q Now, Dr. Hansen, did anybody in the institution tell you that you would not be considered because of the Saturday Review article which I take it is the Robert A. Carter article? Is that the one we are referring to?

A That is another one I may have missed then.

Q Are you referring to the Susan Philson article?

A I am referring to the latter.

Q Right.

A The article was discussed in our interview with each other.

Q And --

A But as for being able to draw a one-to-one relationship between the article and the decision, of course, no man can make that kind of interpretation conclusively.

Q What I am saying is, if we can get as much specifics as we can: Did anyone in the institution say to you in words or substance, "Dr. Hansen, we cannot consider you because of that article."?

A The answer to that question is no. Obviously, such a close connection is rarely made in an employment situation. But, I have told you that the article was raised with me, and a discussion ensued with respect to it.

Q But no one made that statement in writing or orally to you?

A That is correct.

Q And as I take it, it was your subjective determination that it was the Susan Philson article in the Saturday Review with reference to the school system that caused you to not be considered for that position?

A I suppose any conclusion is subjective. So I will answer yes to that.

Q But you have no objective evidence other than the article that was discussed?

A Sir, I have discussed with you now twice the reference

to the article and a discussion of its intent and meaning in the interview situation. That I maintain is objective evidence of interest in the article.

Q By the way, Dr. Hansen, are you employed at present?

A I am not employed.

Q Now, you indicate in paragraph "(b)(1)", which is on page 2, directly under "(a)", that you had a -- because of a "conscientious disagreement with the legal and education validity of the said Judgment and Findings of Fact, Conclusions of Law and Opinion upon which the same is based, he has been required to retire effective July 31, 1967, as Superintendent of Schools, notwithstanding that he is entitled, under contract with the Board of Education, to continue as such Superintendent until the 21st day of May 1970."

Now, when did you submit your resignation?

A I don't remember the date. I made the announcement July 3 but the actual presentation of retirement papers came to the Board approximately 10 days after that announcement.

Q Dr. Hansen, did the Board ever request you to submit your resignation?

A The Board did not.

Q And so the determination to submit it was -- if I may use the term again -- your own subjective evaluation of the

situation?

A The Board placed me in a position which confronted me with the alternative of either acting in violation of the Board's direct orders or suspending an operation in which I had the deepest conviction by ordering me not to appeal even though I am technically -- or was then -- a member of the Board of Education. The Board took away from me a right which I believe has Constitutional implications if not particular and direct Constitutional definitions to support it, a right which it had no right to deny me.

I have been advised by legal opinion -- or was then ---- that the order was in fact a nullity because I was told that no agency can remove a right from another by its action.

But, nevertheless, as a matter of professional dignity and a matter of professional honor, I was obliged by the action of the Board to withdraw from its employment, in order to be in position to appeal a decision which in my judgment is intervention by a court into the right of the Board of Education to make policy determinations concerning school management.

Q Pardon me. What I am getting at is: But for your own decision to submit your resignation, you could still remain

legally as superintendent today, isn't that correct?

A. My point again, Mr. Kuntsler, is that I had no choice unless I were to completely submerge honor, forget about self-respect, in the face of the Board's action but to retire.

Q. Well, putting that aside for the moment, in our discussion, legally, you could have remained as superintendent of schools had you decided to do so, isn't that correct?

A. There is a question as to whether I could if I should have decided in any case to appeal. The Board then would have been obligated I suppose to file charges against me leading to my dismissal.

Q. But -- but for disobeying the Board's order, you could have remained superintendent of schools, isn't that correct?

A. This is a question which really in the last analysis, I am not competent to answer.

Q. Now, Dr. Hansen, I will accept that answer for the record. -- You have indicated in paragraph "(b) (2)" that as a result of the damage to your reputation and standing in the profession that your earning capacity through employment, writing and publication has been damaged and impaired.

Would you indicate for the record what your earning

capacity was through writing? What you were earning through writing, for example, for the past five years?

A I wonder if it is necessary to divulge this kind of information? It is in the income tax returns.

Q Well, you are making an allegation here that your earning capacity has been damaged and impaired, and of course, that is one of the reasons why you want to intervene, is to I imagine to offset that. I am just trying to find out,—We are making a record here.--what the amount of that earning capacity has been for the past five years.

A Shall I?

THE COURT: Can you say approximately, Doctor?

MR. KUNTSLER: I would like that.

THE WITNESS: Yes, I can give you the amount through writing and honorariums for speaking. It is so slight that I am embarrassed in this public tribunal to mention it, when I consider how much others seems to be making in this category; but I would say over the past five years ---

MR. CAMPBELL: Excuse me. Is it necessary, if the Court please, to have this in the record? I would object unless Your Honor feels it is important.

THE COURT: I think Dr. Hansen is saying that the

honoraria and the other remunerations he has received is minimal. Is that right, Doctor?

THE WITNESS: Well, I am doing this thing on relative basis, Let me say over the last five years -- I have no real objection to mentioning this because there is nothing significant in here -- that my earnings through these means, publication of two books, and certain number of articles, and some speeches would run perhaps \$2500 on the average, over a five-year period.

BY MR. KUNTSLER:

Q \$2500 a year?

A A year.

Q Are you writing at present since you left the employ of the Board of Education?

A I tend to be writing almost all the time one thing or another. I am writing, putting together a document which may -- God willing -- turn out to be a book; but at this point of gestation, I think I would call it only that I am assembling material on education questions.

Q Is your -- would you say that the amount of time you are spending on writing now is more or less than before your resignation as Superintendent?

A I suppose I'd have to say candidly more; because I really have nothing else to do but this at this time.

Q So, is it reasonable to anticipate that you will at least continue your \$2500 a year average?

A I have no reason to believe that now. There is no indication that there will be any -- any opportunities of any significant kind coming to me as a retired Superintendent.

Q But, you are looking forward to the publication of this book you are writing, is that correct?

A I am trying to be very cautious about this, Mr. Kuntsler. To indicate that this may not come into publishable form. I have a great horror of making a prediction of this kind and then finding nothing materializing; and so, may I answer this vaguely, that I am trying to put together a set of materials on education as I have experienced it through the last 20 years. But, whether it materializes as a book, is still an open-ended question.

Q Your book on the track system is still in print, is it not?

A Yes, sir.

Q Now, Dr. Hansen, you claim, and I am putting the two paragraphs together now, "(b)(1)" and "(b)(2)", -- that you will suffer great financial loss amounting to approximately

\$14,000.00 per annum for the duration of your said contract.

Now, how much was the per annum pay under your contract with the Board of Education?

A It was \$26,000.00.

Q What are you receiving at present?

A I am receiving the retirement annuity of \$12,000.00.

Q \$12,000.00? Now, outside of the institution which you mentioned before, the one which you came to the conclusion that they did not take you because of an article in the Saturday Review, have you been attempting to obtain other employment with other institutions?

A I have made some inquiries generally. However, the opportunities that flow toward the individual on the part of people who might be interested -- and, since I have to be personal again, the fact is that I have had no offers of employment since I have retired.

Q Have you been attending any of the professional conventions or conferences around the country with reference to school administration.

A No, sir, I have not.

Q Isn't it a fact, Dr. Hansen, that many of the initial contacts for employment as Superintendents or Assistant Superintendents are made at these meetings?

A. I understand so. I am placed in a very unusual position in that up to this time not having sought a job except for my initial appointment in the teaching profession, I am not versed in the politics of job hunting. So, it may be that I am naive in not going into the conventions that you speak of and let it be known that I am available. That I have not done.

Q. Dr. Hansen, with reference to paragraph "(c)" on page 2, you state that you have an interest in the public expense involved in the compliance by the Board of Education with the said Judgment of this Court. Enquote.

Would you indicate for the record what public expense you have reference to, and what is that public expense?

A. I suppose no one at this point, even the Board of Education, can begin to estimate the expense involved in the ultimate application of the doctrine in the Court's Judgment; and this is one reason I am appalled by it; that there seems to be an inexhaustible range of possibilities in the application of the Decision; no one can estimate the effect upon the pupils, upon the teachers, upon any aspect of school management, much less the cost.

Q. Would that "no one" include yourself?

A Include myself indeed.

Q Now, did you, yourself, make any calculations that you are prepared to submit for the record as to what public expense was involved by the decree of this Court, its implementation in this case?

A I have made no such tabulation and, of course, do not intend to, shouldn't be called upon to do this, for the reason as I have already said, the ultimate cost even in the earlier stages of the cost is almost impossible to calculate.

Q So, you can't even state that the implementation of the Court's decree of June 19, 1967, would be more or less expensive for the taxpayers of the District, could you?

A Oh, I could certainly stipulate it would be more expensive than would be normally the case. For example, if it is the destiny of the school system to build new schools in the central area of the park or in suburban Maryland, abandoning the old schools, and abandoning the neighborhood school concept, even one massive park school would cost surely within the neighborhood of ten, fifteen million dollars -- this is using a rule of thumb figure there; and so anyone who would presuppose that the decision of this Court could be carried out without extraordinary outlays of money, is either naive or

hopeful of misleading the public.

Q But, you haven't yourself? That is what I am trying to get at. But, you haven't yourself for your own purposes made any individual appraisals?

A I have not for the reason that no one could.

Q By the way, Dr. Hansen, do you live in the District of Columbia?

A I do.

Q Where do you live?

A I live at 6946 Greenvale Street, N. W.

Q I take it ---

A (interrupting) And my name is in the telephone book in case you wish to confirm it.

Q All right. Dr. Hansen, I am not implying in any way ---

A (interrupting) I understand, but -- You could confirm this information without checking with me on it.

Q And, if I ask you questions, Dr. Hansen, which seem elementary, you realize we are in a Court of Law and we are making a record, and it is not to harrass you in any way.

A I understand.

Q You indicate in paragraph "(d)" that you are vitally concerned as a citizen, resident and taxpayer of the District of

Columbia with the administration of the school system. And, I take it, that is still your position?

A Yes, I think every citizen in this community ought to be concerned.

Q Now, you indicate that you are further concerned that the judgment of this Court constitutes an unlawful judicial invasion into the administration of schools and the formulation of education policies. Is that still your opinion today?

A It is, more than ever.

Q All right. I take it that is one of the reasons why you are moving to intervene?

A That is correct. That is one reason. I gave up my job in order to do it. This is really the heart of the question.

Q Is the purpose of giving up your job as you now indicate it, in order to make yourself available for carrying on this fight against the Court's decree?

A Just as an individual citizen who can foresee calamity to public education if the Court's decision is implemented; if the drawing of a boundary line has to be checked with the Court on an issue of Constitutionality, or the question of how to group for instruction has to be checked with the Court on an issue of Constitutionality, the breakdown in the management of public

education here and anywhere else in the country where this ruling may be applied, ultimately foreshadows the destruction of public education, dooms it.

Q That is what you think is the effect of it?

A I know it is the effect of the decision.

Q Now, when you say in your motion that the acceptance of this decree presumably without an appeal -- is what you meant there -- by the Board of Education, is an abdication of its legal responsibilities -- Remember that statement?

A Yes.

Q On the bottom of page 2, and I take it, it is your position that the Board's failure to appeal is such an abdication?

A And my judgment on this in July has been confirmed by subsequent actions and events.

Q When you did this in July that was your opinion and still is your opinion?

A And was confirmed by subsequent events.

Q Is it your opinion, Dr. Hansen, that a school board has the obligation to appeal every adverse ruling by any court?

A If a school board is a defendant in a case and loses a case. It either was a defendant by fraud or it should appeal, in my judgement.

against the charges in earnest and good earnest, it should then appeal an adverse decision.

BY MR. KUNTSLER:

Q Then your --

A Or, it should have withdrawn from the case before the decision was rendered.

Q But your answer to my question then as to whether a school board should always appeal an adverse decision would be yes?

A Yes, if it remains as a defendant.

Q Now, Dr. Hansen, during a great deal of the trial of this action, or some of it anyway, you were present in the courtroom, were you not?

A Yes.

Q And, during the trial and prior thereto, you, I imagine consulted at some length with the attorneys who were representing you as Superintendent, and the School Board?

A Yes.

Q And at any time had you ever indicated or would you state now, that they were not performing their functions in the way which you would consider proper for attorneys in their position?

A On the contrary, I think the representatives of the Corporation Counsel's Office did a superb job. Especially, -- as a non-lawyer of course impressed by -- their statement of findings presented to the Court it seemed to me were incontrovertible.

Q And you felt you were adequately represented?

A I did.

Q As a defendant in that action?

A I did.

Q I take it, if you will turn to page 3, Dr. Hansen, and to paragraph 3, which is on the top page, I take it -- It is your firm opinion that the judgment of this Court of June 19, 1967, is a judgment that tends toward segregation of the races. Is that what you are saying there?

A This is my judgment. And, I believe that present trends support that judgment. And my 20 years of experience in Washington, seeing the change that -- the transition particularly over the last 12 -- support that judgment. I believe I testified to this point before this Court, that you can't enforce integration.

Q That is your essential position, is it -- now as well as then?

A Yes.

Q That the Court -- Let me just finish the question. That Court's of law in this field cannot really accomplish the goal of racial harmony as far as educational systems are concerned?

A I have not said that.

Q Is that your position?

A I have no comment to make on the business of racial harmony. I am talking about the Court placing upon the Board of Education an affirmative responsibility to establish racial -- and in this case -- economic balance in the schools; that this kind of adjustment in human relations cannot be accomplished by edict, by legislation, whether it comes from a court or from a Congress. That this kind of appreciation -- understanding -- has to come through the will of the individual to participate, which can be accomplished through education, but cannot be accomplished through force.

Q Dr. Hansen, if I asked you the same question in a little different phraseology: For example, if I said to you: Do you think Courts can in any way equalize educational opportunities between both black and white pupils, insofar as poor and more affluent pupils?

A The Court made reference to Ferguson versus Plessey, I believe, and resurrected the separate but equal doctrine. I would suppose if there is gross discrimination within a jurisdiction in the allocation of school resources, deliberate discrimination against one class or another, intervention by an agency is in order, whether it is legislature or the Board of Education, the community, or a court. I cannot tell you from a legal point of view whether this is a matter which the Court may have jurisdiction over except upon Constitutional issue.

Q And, of course, it is your opinion, is it not, Dr. Hansen, that the facts of this case did not show any such deliberate conduct on the part of the school -- ?

A (interrupting) The facts in this case, if they are properly analyzed indicate the opposite. Except for a few schools that by the nature of the administrative situation where the schools were small, two or three or four teachers, and the teachers were old, the predominance of the resources being brought into the school system was in the direction of the inner city; the poor sections of the city. As a matter of fact, we early began an effort to secure funds from all sources, including private grants and donations

to be applied to the benefit of the children most in need of these extra benefits.

Q If I can interrupt. I don't want to fight that battle again -- all I am --

A You raised the question.

Q (continuing) All I am asking you in the question, is that you, at this point, one of the reasons why you are taking the stand as you are, is you disagree with the Court's interpretation of the facts as against your own, is that --- ?

A Yes, I do. I would say that if in fact, I, or the Board of Education, or any of our administrators was guilty of intentional and pre-determined discrimination against any child because of race, then adverse rulings should be mandatory and would be justified. It is on the issue of facts that I disagree with the ruling of the Court.

Q And that is essentially why you want to intervene? One of the reasons, isn't it, that you disagree so strongly with that resolution of that issue of fact?

A I am primarily concerned with intervention of the court in the policy-making operation of the school system. The allegation of funds being one phase of that, but the other factors being organization for instruction, grouping

for instruction, design of schools, site selection; all these factors which are primarily the function of the Board of Education and its professional staff should not become the function of the Court under any circumstances.

Q You read the decree in this matter, did you not?

A Yes. I -- in a sense, I should mention to you in addition to doing whatever writing I could do, I spent a great deal of time in this case, and on the transcript, a study of the ruling itself; and I might say this gratuitously that I must disagree again with the findings of the Court not with its intention. I agree with Mr. Campbell that this Court has distinguished itself in the field of human rights; but with the findings of the Court, with the use of the testimony, and the conclusions drawn, I think there needs to be an opportunity for a re-evaluation and reassessment of the findings.

Q Aren't you at this moment preparing some writing on this case?

A I would have to answer that I have not anything special on it, except as I am writing my prospective book. Obviously, I can't deal with my experience in Washington without dealing with the case.

Q Now, Doctor Hansen, I am still referring to paragraph "(3)", in which you request this Court to take judicial notice of substantial community dissent from the said Opinion and Judgment.

Can you indicate to me what the nature of that substantial community dissent has been as far as you know?

A I can only make a judgment on what proportion of the consultation or discussion people had with me concerning the case.

Q That being -- ?

A And since the ruling was handed down, I have had in many many calls from people, personally, some cases, letters.

I hope I won't have to submit these letters to the Court, but there is certainly a large number of letters from people raising the question of the future of the school system and public education. Yes, I would say that perhaps any kind of poll taken throughout the community would find that this case has elicited extraordinary attention, some of it negative and some of it positive.

Q Dr. Hansen, if you know, could you answer the question -- would you say the substantial communications you have had have been from the members of the white race rather than the black race?

A I have had substantial communication from members of the Negro race as well.

Q I am asking the question of the proportion between white and black as to people who have contacted you.

MR. CAMPBELL: Object, if the Court please.

THE COURT: What is the basis of the objection? Counsel wants to know where the ---

MR. CAMPBELL: If I understood the question, it was the proportion of people who agreed with the Court's decision whether they were black or white.

MR. KUNTSLER: Might disagree.

MR. CAMPBELL: (continuing) Might disagree with the Court's decision; whether they were black or white, in letters to Dr. Hansen. I don't believe it is material to the issues in the case.

THE COURT: Mr. Kuntzler, I believe we are going far afield. I suggest you proceed to something else.

MR. KUNTSLER: All right, I will.

BY MR. KUNTSLER:

Q Dr. Hansen, going back to page 3, at the very bottom -- "(4) (b)", you discussed there the motion of the Board of Education ordering you not to appeal this judgment and it was that order, which you said -- and it is the basis of your opinion that you were deprived of your civil rights



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BRIEF FOR APPELLANTS

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,167

CARL C. SMUCK
a Member of the Board of Education
of the District of Columbia,
Appellant

v.

JULIUS W. HOBSON, *et al.*,
Appellees.

No. 21,168

CARL F. HANSEN,
Superintendent of Schools of the
District of Columbia,
Appellant,

v.

JULIUS W. HOBSON, *et al.*,
Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of
for the District of Columbia Circuit

FILED JUN 26 1968

Neilson J. Paulson
CLERK

F. JOSEPH DONOHUE
THOMAS S. JACKSON
EDMUND D. CAMPBELL
JOHN L. LASKEY

Attorneys for Appellants

(i)

QUESTIONS PRESENTED

PART ONE

(Preliminary Issues)

1. Do appellants have standing to intervene for the purpose of appealing the judgment of the district court entered June 19, 1967?

2. Should the judgment below be reversed because the Chief Judge exceeded his jurisdiction and authority by separating one cause of action from the other five when convening a three-judge court under Title 28, Sec. 2282, U.S. Code, and because the trial judge proceeded to try the merits when the whole case was, or should have been, pending before said three-judge court, whose judgment was subsequently appealed to, and is now pending in, the Supreme Court of the United States?

3. Should the trial judge have disqualified himself?

PART TWO

(The Merits)

1. Does a neighborhood school plan, which is admittedly drawn fairly and without segregatory intent, violate the Constitution because the population in certain neighborhoods is predominantly Negro or impoverished?

2. Was it proper for the trial court to dictate educational policies in the District's schools with respect to ability grouping of pupils?

3. Have the school administration's efforts to achieve teacher integration complied with constitutional requirements? Furthermore, was it proper for the trial court to order mass reassignment of teachers in an action to which no teacher is a party?

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,167
CARL C. SMUCK
a Member of the Board of Education
of the District of Columbia,
Appellant

v.

JULIUS W. HOBSON, *et al.*,
Appellees.

No. 21,168
CARL F. HANSEN,
Superintendent of Schools of the
District of Columbia,
Appellant,

v.

JULIUS W. HOBSON, *et al.*,
Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

The jurisdiction of the District Court was invoked by plaintiffs under Title 28, United States Code, section 1331 (upon allegation that this action arises under the Constitution of the United States) and under Title 28, United States Code, section 1343. Plaintiffs further invoked the court's jurisdiction under Title 28, United States Code, section 2281.

STATEMENT OF POINTS

PART ONE

(Preliminary Issues)

1. The Chief Judge of this court erred in separating one cause of action when convening the three-judge court. The trial court erred in proceeding to try the other causes.
2. The trial judge erred in failing to disqualify himself.

PART TWO

(The Merits)

1. The trial court erred in compelling defendants to modify their neighborhood school policy.
2. The trial court erred in compelling defendants to abandon the method of pupil ability grouping used in the District of Columbia schools.
3. The trial court erred in ordering compulsory reassignment of teachers.

STATEMENT OF THE CASE

PART ONE

(Preliminary Issues)

This action was begun by the filing of a Complaint (App. 1-17) in six counts. The plaintiffs (now appellees) are the parents of school children entitled to education in the public schools of the District of Columbia, and the children themselves. The defendants were all of the judges of the District Court, the Board of Education, its members, and its Superintendent. The first count alleged that Section 31-101 of the District of Columbia Code was an unconstitutional delegation of executive authority to the Court. The remaining counts charged that in the exercise of their presumed authority, the school defendants were violating the constitutional rights of the plaintiffs by sundry acts by which they perpetuated segregation of races in the schools. The judges promptly moved dismissal (App. 29); the other

defendants answered (App. 18); and the plaintiffs moved for summary judgment. (App. 25). The Chief Judge of this Court appointed Circuit Judge J. Skelly Wright to sit as a District Judge for the purposes of the case. (App. 31). Judge Wright, as such, referred the case to the Chief Judge for the purpose of convening a three-judge court under Title 28, section 2282 of the United States Code. (App. 29). In his turn, the Chief Judge convened such a Court, naming Circuit Judges Fahy and Miller to sit with Judge Wright (still sitting as a District Judge by designation) to hear only the first cause of action, remanding the other causes of action to Judge Wright. (App. 31). Counsel for all defendants objected to the convening of the three-judge court on the ground that the constitutional attack was frivolous, and to the severance of the first cause of action from the others. The three-judge court on February 19, 1967 (265 F.Supp. 902) held the first cause of action to be without merit (but not frivolous) and dismissed the first cause of action as to the defendant judges. That court had previously held that it did not have before it any of the other causes of action since they were not referred to it by the Chief Judge. Prior to and after the convening of the three-judge court, Judge Wright proceeded as a single District Judge to hear all matters relating to the second through sixth causes of action, notwithstanding the filing by the remaining defendants of a "Motion for Voluntary Displacement" (App. 48) which he overruled from the bench (Tr. 2285) as coming too late and filed as part of a general plan of defendants to delay and frustrate the trial of the case. On June 19, 1967, Judge Wright filed his Opinion, containing his Findings of Fact, Conclusions of Law, and his Judgment which broadly granted injunctive relief to the plaintiffs, directing the defendants to file a plan in conformity with his Opinion and Findings, and retaining jurisdiction for the purposes of implementation. (269 F.Supp. 401). The Board of Education, meanwhile having had changes in the composition of its members, decided not to appeal, and directed its Superintendent, Dr. Carl F. Hansen, not to do so on pain of dis-

charge. (App. 393). On July 17, 1967, Dr. Hansen (having applied for and having been granted retirement, effective July 30, 1967) noted his appeal as Superintendent of Schools, and on the same day, Carl C. Smuck, a named defendant member of the Board, noted his appeal. (App. 390). On July 19, 1967, Rev. William D. Jackson and others, as parents of school children, and Dr. Hansen as an individual, filed their motions for leave to intervene for the purpose of appealing on the record. (App. 391, 395). Plaintiffs filed opposition to the motions (App. 398) and Judge Wright on July 28, 1967, heard argument and took the same under advisement. Meanwhile, appellee-plaintiffs filed a motion to dismiss the appeals of Hansen and Smuck (App. 398) and they (the latter) together with the proposed intervenors, filed a motion to reverse and remand the case to the District Court with direction to vacate the judgment below on several grounds relating to the alleged failure of Judge Wright to disqualify himself and on the ground that he did not have jurisdiction to try it. (App. 403). This was opposed by appellees, and the motions to dismiss were heard by this Court, *en banc*, on November 14, 1967. This Court on December 18, 1967, entered an order remanding the case to Judge Wright to hear evidence, make findings and act on the motions for leave to intervene (Order of 12/18/67) but retaining jurisdiction of the case for the purpose of final disposition. On January 23, 1968, in compliance therewith, Judge Wright heard further argument and received the testimony of Dr. Hansen; and on February 19, 1968, entered his Opinion, Findings and Judgment granting the several motions for leave to intervene. Upon return of the record to this Court by the court below, appellees renewed their motion to dismiss as to all appellants. One proposed intervenor, a teacher, Lawrence A. Wilkinson, withdrew his motion for leave to intervene and is no longer party to the case.

Thus, this case is now before the Court on appeals taken by Dr. Hansen in his official capacity, and by Mr. Smuck in his capacity as a member of the Board of Education, and

appeals by Dr. Hansen as an individual, and the parent-appellants as parties who have already been allowed to intervene by the court below. There is pending for disposition, in addition to the merits generally, motions by appellees to dismiss all of the appeals on the ground that the appellants lack standing, and the motion of appellants to reverse and remand.

PART TWO

(The Merits)

One unyielding fact stands out above all others in this case: more than 90 percent of the pupils enrolled in the District of Columbia's public schools are Negro.

At the time of the Court's decisions in *Brown v. Board of Education*, 347 U.S. 483 (1954) and *Bolling v. Sharpe*, 347 U.S. 497 (1954), 43 percent of the District's public school pupils were white. (Opinion 442). At the time of the trial in this case, that figure had shrunk to 9.8 percent. (Opinion 410). Since then there has been an even further decrease in the percentage of white enrollment. In the current school year, white enrollment has slipped to approximately 8 percent.¹

At the time of the Supreme Court's decision in *Brown*, the District's public schools were completely segregated by law. (Opinion 408). However, even before this historic decision, Dr. Hansen and other members of the District school system began preparations for desegregation in the event of a decision such as that ultimately rendered. (Opinion 408-09). The Board of Education did not wait for further clarification of the decisions in *Brown* and *Bolling v. Sharpe*. Within ten days of their announcement, it declared that, beginning immediately, pupil assignment would be made without regard to race. Under the leadership of Dr.

¹ Report of Pupil Membership in Regular Day Schools on October 19, 1967, Office of the Statistical Analyst (November 3, 1967). The precise figures are, white 7.8%, Negro 92.2%.

Hansen, then Assistant Superintendent, new school boundary lines were drawn so that any child could go to the school nearest his home, regardless of race. (Tr. 600). When the school doors opened in September of 1954, 73 percent of the schools had racially mixed enrollments. A year later, this figure was increased to 87 percent. (Hansen, *Miracle of Social Adjustment: Desegregation in the Washington, D.C. Schools* (1957); Opinion 411). The concept employed then and followed since was that of the neighborhood school, a plan uniformly regarded at that time as the norm for public schools under the *Brown* decision. (Opinion 418). The neighborhood school policy has remained the fundamental plan of the District's schools since 1954. As the trial judge in this case expressly recognized, it is a plan which was initiated by the Board of Education out of a sincere belief in its legitimate values and maintained for "racially neutral reasons." Judge Wright emphatically refused to find, as he was urged to, that the Board had adhered to the neighborhood policy "with a segregatory design." (Opinion 418-19).

Soon after this historic change, a serious disparity in the ability of the pupils became evident from reports and testing. Tests in 1955 showed, for example, that tenth grade students ranged from as low as second to beyond twelfth grade levels in reading and arithmetic. (Opinion 442-43). To meet this crisis in the District's school system, the Board resorted to a system of ability grouping with varying levels of curricula. Ability grouping systems are used widely throughout the United States in cities such as San Francisco, New Orleans, Cleveland, Philadelphia and New York, to name a few. (Dfts. 11). For more than fifty years prior to the *Brown* and *Bolling* decisions, the District's schools had used ability grouping to provide differing levels of curricula designed to meet the differing levels of capacity for education found in its pupils (Tr. 3028, 3031, 3048-49). The plan selected by the Board of Education and put into use here in 1956 was that primarily designed by Dr Hansen, the "track system," employing four levels of curricula.

The trial judge recognized that the track system was not instituted with any purpose of separating Negro and white pupils and that it was administered without any such design or intent. Judge Wright said: "The court is persuaded that Dr. Hansen personally was then and is now motivated by a desire to respond—according to his own philosophy—to an educational crisis in the District school system." (Opinion 443). The purpose of the four-track system has remained that of providing better education for *all* the District's public school students by providing each with instruction suited to his or her own capacity for learning, regardless of race.

The Neighborhood Schools and Pupil Assignment

The District of Columbia public school system is operated on the neighborhood school policy, one almost universally employed in the public schools of the United States. (Tr. 3120, 5031-35). With certain limited exceptions, the District's pupils who live within a neighborhood attend the school located in their neighborhood. (Tr. 135). The size of the attendance area varies between school levels. It is smallest at the elementary school level, larger at the junior high school level, and largest at the senior high school level. (Pltfs. N-7(a), 7(b), 7(c)). As Judge Wright stated, the neighborhood school has "undeniable advantages," such as the reduction of travel time and expense, safety, and the improvement of relations between parents and school. (Opinion 409). Though centered on the neighborhood of his residence, the plan, as administered in the District, does not "localize" the child. The District's schools constantly seek to expand their childrens' horizons by taking them on excursions out of their local community into other areas of the city and into other parts of the country, from Williamsburg, Virginia, to Canada. (Tr. 203).

School boundaries have been drawn to distribute the District's school population evenly among the school buildings. They are changed when new schools are opened or there are substantial shifts in population. (Tr. 131).

The racial composition of individual schools necessarily varies with the residential pattern of the District. This residential pattern, like the 92 percent Negro enrollment of the District's schools, is an unyielding fact confronting any policy of public school education in the District. It was noted and described by the trial court as follows:

By the time of *Bolling v. Sharpe*, segregated residential patterns blighted the city. Since then the conditions have worsened. White families have deserted the Northeast, and the white population has greatly thinned in the high Northwest and in the quadrant of the city south and east of the Anacostia River. (Opinion 410).

The figures underlying this summary are simple, and significant. In 1953, the District's population was 60 percent white, 40 percent Negro. By 1965, these figures were reversed. (Opinion 410).

Because of the pattern of residential separation, many of the schools in the predominantly white neighborhoods west of Rock Creek Park have a high ratio of white pupils, while certain schools in other areas are all Negro in student body. From a collection of statistics based on certain set percentages of racial composition, Judge Wright concluded that there was "massive" actual segregation, defining "segregation" to mean "the state of racial separateness in the schools, regardless of cause." (Opinion 411-12).

Plaintiffs invited the trial court to find that the neighborhood school policy was "only a front" to cover intentional racial segregation. The court flatly rejected this invitation, finding instead:

- (1) that the Board of Education initiated the neighborhood school policy in 1954 because they "sincerely believed in the neighborhood school policy and the legitimate values they saw it as furthering,"
- (2) that "racially neutral reasons . . . alone suffice to explain the initiation and retention of that policy," and

- (3) that the evidence was "not enough to show [in a phase where the burden was on the plaintiffs to show] that in any real sense the Board of Education has adhered to the neighborhood policy with a segregatory design." (Opinion 418-19).

The statistics themselves support this conclusion, when seen from a different viewpoint than that from which they were presented in the trial court's opinion. Judge Wright plucked out 85 percent as the cut-off point for meaningful integration:

For expressing the degree of segregation in Washington's schools, the court will call a school "predominantly" Negro (or white) if 85% or more of its students are of that race. This cut-off point is relevant to evidence adduced by the parties respecting the stage of segregation beyond which the educational and social advantages attached to integration disappear. (Opinion 411).

Despite the District's blighted residential pattern, the figures adduced by the trial court at pages 411 through 412 show that there is a higher percentage of "integrated" schools, of every level, than the percentage of white pupils in the District available for "integrating." Twelve percent of the elementary schools, 14 percent of the junior high schools and 18 percent of the senior high schools were so "integrated" in the 1966-67 school year. Yet it is obvious from the figures that if absolute, compulsory "blending" (by busing, gerrymandering, etc.) were carried out, not one school in the District would be meaningfully integrated within the percentage concept selected by the trial judge. Today, only 8 percent of the District's public school pupils are white.

Optional Zones and Open Schools

There are, and have been, certain limited exceptions to the neighborhood school policy in the optional zones and open schools which have been established and maintained

to relieve overcrowding and to give parents the opportunity to send their children to more racially balanced schools.

An optional zone is an attendance area, generally located between two or more schools, whose pupils may elect to attend any one of the surrounding schools. (Tr. 153). An open school is an under capacity school that can accept pupils from anywhere outside its attendance area that were attending overcrowded schools. (Tr. 2652).

Under the open school policy, there have been frequent transfers of Negro pupils into open schools with predominantly white enrollments. (Tr. 138-139). Western has been an open school since before 1958. (Tr. 2652, 2609). During the 1965-66 school year, 405 pupils from east of Rock Creek Park attended Western. Wilson was also an open school during this year, in which 122 pupils from east of the Park attended it. (Ptf. N-7(a), N-9).

As far back as 1944, an optional zone was in use between Wilson and Western, then all white in student composition. (Tr. 152-53, 2956). The junior high school children that lived within the Western-Wilson optional zone were required to attend Gordon Junior High School, a feeder school to Western, because that optional zone was within the Gordon attendance area. Following graduation from Gordon, some parents living within the Western-Wilson optional zone could choose to send their children to Wilson which was in the opposite direction from Gordon. Deal Junior High School is the feeder school for Wilson and these two schools are located only a block apart. To accommodate families who had children split in two directions between Gordon and Wilson, the Gordon-Deal optional zone was created in 1963 to be coterminous with the Western-Wilson optional zone. The zone was not created out of racial considerations but to accommodate the families who had children at Gordon and Wilson. (Tr. 162-63, 169). Nor did race enter into the continued maintenance of the Western-Wilson zone after *Brown and Bolling*. (Tr. 2982).

In May, 1966, both the Western-Wilson and the Gordon-Deal optional zones were eliminated and the fixed boundary lines between Gordon and Deal and Western and Wilson continued to be coterminous. Therefore all Gordon pupils went to Western and all Deal pupils went to Wilson. (Tr. 162-64; Pfts. N-4(a)). During recent school years, about 25 senior high school pupils lived within the Western-Wilson optional zone. A lesser number of junior high school pupils lived within the same area and had the option of attending Gordon or Deal. (Tr. 2848).

An optional zone had been created in the Crestwood area between Roosevelt and Western senior high schools in 1954 to give pupils residing in the Crestwood area an option of attending either school. (Tr. 2956-57). The zone was originally developed as a safety-valve in the transition years immediately following desegregation (Tr. 2957) to prevent serious social tensions. (Tr. 2980-81). It was the only optional zone created for this reason. (Tr. 2983). At that time the pupil population of Roosevelt was rapidly changing from predominantly white to predominantly Negro and has been predominantly Negro for some time. (Tr. 2958; Dfts. 20(3)).

The original purpose of these Crestwood area optional zones (Pfts. N-7-c) has long since ceased to exist. At the time of the trial these zones were continued in existence in order to help distribute pupil population and eliminate overcrowding as much as possible. (Tr. 2978). In 1965, Roosevelt was 108 percent of capacity and Cardozo was 127 percent of capacity. However, Western and Wilson were 101 and 92 percent of capacity, respectively. (Pfts. L-11).

Wilson was added to the Roosevelt-Western optional zone in 1965. (Tr. 2845). Pupils in the Crestwood area, which is a predominantly Negro area (Tr. 2981) have the option of attending Wilson as well as Western and Roosevelt. (Tr. 2819).

The Dunbar-Ballou optional zone in Southwest Washington was created in 1960 when Ballou Senior High School

was first opened. (Dfts. 135). At that time both Dunbar and Ballou were below capacity. (Tr. 2852). Dunbar had a predominantly Negro enrollment (Tr. 2982) and Ballou had a predominantly white enrollment. (Dfts. 20(g)). The optional zone was established to give all the pupils residing within the zone, regardless of race, an opportunity to attend an integrated school. (Tr. 2852, 2982).

The Dunbar-Ballou optional zone was changed to the Dunbar-Western optional zone on May 27, 1966 (Pfts. N-4(a)) because Ballou became so overcrowded; it was 121.4 percent of capacity in October, 1965 (Pfts. L-11; Tr. 2661, 2982). Dunbar continued to be overcrowded (120 percent). (Pfts. L-11). Western was substituted for Ballou because it was the only school close to Dunbar without substantial overcrowding (101 percent). (Pfts. L-11, N-7(c)). A continuing effect of that optional zone is to give parents of both races residing within the zone an opportunity to send their children to an integrated public school. (Tr. 2984). The population within the Dunbar-Western optional zone is predominantly Negro. (Tr. 2662). During the school year 1965-66, more Negro pupils than white pupils attended Western from the Dunbar-Western optional zone. Some Negro parents but no white parent chose to send their children to Dunbar, which had only three white children in the entire school and serves a lower income neighborhood than Western. (Pfts. P-4, F-3, Tr. 6713). Without this option, parents in the Southwest area would send their children to private schools rather than to Dunbar. (Tr. 2984).

An optional zone was created between Paul and Backus junior high schools at the request of Neighbors, Inc., for the purpose of keeping the white minority at Paul rather than diluting it between the two schools. (Tr. 2867). This optional zone was created when Backus was opened (Tr. 2865) in 1963 (Dfts. 135). In October 1963, Paul had 865 Negro pupils and 262 white pupils. Backus had 1,140 Negro pupils and 45 white pupils. (Pfts. P-6). In 1965, the number of whites in Paul had declined to 136 pupils, and in

Backus to 33 pupils. (Pfts. P-4). In 1966, the number of white pupils was 88 and 15 respectively. (Dfts. 142).

The trial judge ignored the obvious racial balancing aspects of the various optional zones referred to above and their assistance in relieving the problem of overcrowding. As we have stated, he decreed that they be outlawed completely, on the ground that they were established "for the purpose of allowing white children, usually affluent white children 'trapped' in a Negro school district, to 'escape to a white' or more nearly white school, thus making the economic and racial segregation of the public school children more complete than it would otherwise be under a strict neighborhood school assignment plan." (Opinion 2).

But the trial judge, after thus outlawing all existing optional zones in his decree, then proceeded himself to direct the establishment of new optional zones which were flagrantly violative of the neighborhood school assignment plan. The court ordered the Board of Education to set up certain wide-open new optional zones to permit children in overcrowded schools east of Rock Creek Park to attend any underpopulated schools west of the Park. The court also directed the Board to provide free transportation for any children who volunteered to make this long twice-daily journey.

Distribution of Educational Resources

The trial court found that there were inequalities in the distribution of physical and financial resources in the District's public school system. By an ingenious application of the "separate but equal" doctrine of *Plessy v. Ferguson*, 163 U.S. 537 (1896), overruled, *Brown v. Board of Education*, 347 U.S. 483 (1954), the court succeeded in holding these alleged disparities unconstitutional and thus arriving at the remedy of court-ordered busing of volunteering Negro students to the western end of the city.

Before any further discussion, it is worth noting the trial court's findings that the "Negro schools" have *not* been deliberately deprived of supplies by school officials (Opin-

ion 441) and that the Board of Education was at the time of trial "in the midst of a good-faith effort to bring all the educational plants in the city up to rudimentary levels." (Opinion 432).

In discussing the supposed inequality in the distribution of educational resources, the court commented that the oldest and poorest school buildings are in the Negro area, but it admitted that the newest and most completely modern school buildings are there also (Opinion 432), and that Negroes are housed in the newest as well as the oldest elementary school buildings. (Opinion 431). In fact, in the so-called "white" area of the city west of Rock Creek Park, there has been no new school built since the early 1930's. (Opinion 431). These schools in the so-called "white" area lack many of the facilities (such as auditoriums and health units) of the newer schools in the section of the city where the population is predominantly Negro. (Opinion 432, Tr. 3620-3621).

The trial court also conceded that a greater percentage of predominantly Negro schools than white had librarians (Opinion 433) and referred to a number of special programs designed to help the Negro and other students from disadvantaged homes. (Opinion 439-441).

The court's concern as to building facilities would seem to be based, in the last analysis, on the undeniable fact that the Board of Education has been unable to obtain Congressional appropriations for new school buildings fast enough to keep pace with the rapidly growing Negro population of the city. As a result, certain schools in the predominantly Negro areas are crowded and certain schools west of Rock Creek Park are not completely filled to capacity. The Board of Education has tried to compensate for some of this unevenness in school population by the optional zones and "open" schools which the court has ordered abolished. Between the fiscal years 1953 and 1966, inclusive, the Board requested capital outlay funds totaling more than 244 million dollars. Of this amount, Congress appropriated slightly

less than 121 million dollars, or less than one-half of the Board's requests (Ptf. O-3; Dfts. 123). The fault here lies not with the Board but with Congress.

The trial judge also presented statistical data which he said "proved" that the Board of Education was spending more money per pupil on "affluent" white children than on Negro and poor children, and indicated that there were unconstitutional inequities in the quality of teaching for children in different sections of the city. (Opinion 436-38, 495-98).

But the trial court's findings here, as elsewhere in its opinion, contain "half-truths" which, when considered in the light of all the evidence, become misleading. Inequalities in physical school facilities of course exist in the District of Columbia as they do in every public school system in the country. As neighborhood population patterns change some schools become more crowded and others less so, during an interim period before new facilities can be built. Fixed costs such as heat and light do not vary in proportion to enrollment. Because of these and other factors (for example, the proportion of "new" teachers with smaller salaries) the "per pupil" expenditure in certain school buildings in the District may be greater than in others. But there is absolutely no evidence that any of these temporary and limited inequalities in "per pupil" expenditure in different school buildings have resulted from deliberate action or intent on the part of the Board, a fact which is conceded by the trial court. (Opinion 441). Nor did the evidence indicate any uniform racial, cultural, or economic status pattern in the variations.

Counsel will not encumber this statement of facts with a detailed analysis of the evidence which rebuts the trial court's strange conclusion on this matter of per pupil expenditure in different schools. We respectfully invite the court's attention, however, to pages C-10 through C-17 of Defendants' Proposed Findings of Fact which were submitted to

the trial court and which contain a detailed analysis of the pertinent evidence.

Faculty and Administrative Personnel

In the school year 1966-67, 78 percent of the District's public school teachers and 69 percent of the school principals and assistant principals were Negro. The trial court stated that "on this record the school administration cannot justly be accused of discriminatorily refusing to hire Negroes as teachers or to appoint Negroes to school principalships." (Opinion 442). Similarly, rejecting the charge that the school system's key administrators were discriminatorily selected, Judge Wright admitted that the school administration had not refused to appoint eligible Negro candidates to positions in the governing structure on account of race. (Opinion 422). However, the trial court did conclude that intent to segregate played a role in one or more of the stages of teacher assignment. (Opinion 429).

This conclusion was reached despite the fact that no teacher was a party to this case. Carolyn Stewart, the only teacher plaintiff, advised the court on the day trial began that she disclaimed all financial, legal or moral responsibility for counsel, his conduct and argument. (Opinion 501, note 175).

For the 1966-67 school year, there were both Negro and white teachers in every junior and senior high school, though some elementary schools lacked bi-racial faculties. (Opinion 422-423). For the 1965-66 school year, there were no elementary school communities that were all white. The 10 schools without a single Negro teacher, counselor, or librarian each had a bi-racial pupil population. The only elementary school without any Negro pupils in the regular classes, Key Elementary School, had a bi-racial faculty, with 2 Negro and 8 white staff members. (Ptf. M-1, P-4). There were only 18 elementary school communities that had no white pupils or staff. (Ptf. M-1, P-4).

The disadvantages of an all-Negro elementary school community are mitigated by the presence of itinerant school

personnel, many of whom are white and who have frequent contact with the pupils. (Tr. 6020-6022). Among these are teachers in art, foreign languages, health, music and science at the elementary school level who move daily from school to school. They number 143, 80 of whom are Negro and 63 of whom are white. (Ptf. M-1).

Of particular importance to this appeal is the posture of the administration's teacher assignment policies at the time of trial. The administration was, and had been, making a conscious, good-faith effort to maximize teacher integration in every way short of measures, such as compulsory reassignment of already employed teachers, which threaten the very existence of the teaching staff. On April 13, 1964, Dr. Hansen issued a directive to school personnel to make a maximum effort to establish bi-racial faculties at the remaining schools in the District of Columbia where they did not exist. (Ptf. L-4). Specific instructions to this effect were issued to the assistant superintendent in charge of elementary schools. The number of elementary school faculties without a single Negro teacher, counselor, or librarian, was reduced from 14 during the 1964 school year to 10 during the 1965 school year. The number of elementary school faculties without a single white teacher, counselor, or librarian, was reduced from 65 during the 1964-65 school year to 62 during the 1965-66 school year. (Ptf. L-4, M-1, M-2). Of these 62 elementary schools with all-Negro staffs, 7 had white principals at the time of the trial, reducing the number of elementary schools without a single white professional staff member to 55.

The District schools with predominantly white pupil enrollment have a declining enrollment, whereas the predominantly Negro schools have an increasing enrollment. Thus, teaching vacancies are created for the schools with predominantly Negro enrollment but are not for those with predominantly white enrollment. (Ptf. P-4, P-5, P-6).

Dr. Hansen has been opposed to the compulsory transfer of teachers who are already assigned because such an

approach would engender resentment among the teachers. (Tr. 79). Until the trial judge's decree, there had been no such compulsory reassignment. (Tr. 2989). There is a problem in obtaining a sufficient number of qualified teachers (Tr. 5079), and compulsory reassignment is shortsighted because of the likelihood that the teachers will move to another school system. (Tr. 5077-78).

Alleged Unconstitutionality of Pupil Ability Grouping

The Board of Education has administered in the public schools a system of pupil ability grouping, referred to as the "track system", which consists of four levels of curricula (Basic, General, Regular and Honors). Plaintiffs alleged that the intent or effect of the track system is (a) to separate the infant plaintiffs and to deny them an education equal to that offered to qualified students who are not Negro or are not "economically deprived"; (b) to deprive them of further educational opportunity by discriminatory utilization of the non-college preparatory General and Basic tracks as far as Negro and economically deprived pupils are concerned while at the same time discriminatorily utilizing the college preparatory Regular and Honors tracks to allow students who are not Negro or are not economically deprived to qualify for college and to separate such students from Negro and economically deprived students, and (c) to discourage and prevent Negro and economically deprived students from completing their secondary education.

The trial court, in a unique departure from its judicial role, has boldly thrust itself into the ability-grouping and pupil testing field. It has declared the ability-grouping program of the District of Columbia schools to be in violation of the Federal constitution. In so doing, the court implied a definite distaste for any ability-grouping of students which could result in separate classrooms for children of differing intellectual abilities. (Opinion 443). The court also condemned the use in the District of Columbia of nationally recognized scholastic achievement testing, and said that such tests could not justify the placement and

retention of children in lower ability groupings for teaching purposes. (Opinion 476-88).

Pupil ability grouping is utilized by many urban school systems throughout the United States both in elementary and secondary school levels. Los Angeles, San Francisco, San Diego, New Orleans, Baltimore, Detroit, Buffalo, St. Louis, New York City, Cleveland, Cincinnati, Philadelphia, Pittsburgh, Houston, Seattle, San Antonio and Milwaukee are examples of cities reporting grouping practices. (Dfts. 11).

Ability grouping has in fact been practiced in the District of Columbia for more than fifty years and, prior to *Brown* and *Bolling*, existed in what were then both the all white and all Negro schools. (Tr. 228, 378-79, 3031, 3048, 3049, 3081-84). The track system, in the general form existing at the time of the trial court's decree, was introduced into the Washington schools in 1956. (Opinion 442).

A good, neutral description of the "track system" of ability grouping is found in the following excerpts from the Passow Report² on the District's public Schools:

Any form of ability grouping is, theoretically, a means of providing the teacher with a more teachable group and consequently, of enabling pupils to receive instruction more nearly appropriate to their academic ability. It generally represents a school's efforts to differentiate learning experiences and come closer to the ideal of individualized instruction. Grouping is designed to counteract the common practice of teaching a total class or, as in the primary grades, two or more sub-groups, in particular subjects. Addressing the total class invites failure to reach those at the extremes—the slow are left behind, the brightest are unchallenged. Working with sub-groups curtails the amount of teacher time and attention given to each pupil. By narrowing the

²*Toward Creating a Model Urban School System: A Study of the Washington, D.C. Public Schools* (June, 1967).

range of academic ability, the teacher is theoretically able to "fit" instruction to the average level of the total groups so that all group members will be served with about equal effectiveness.

Tracking is one form of ability grouping. However, as commonly used, it differs from other forms of ability grouping by operating on predetermined, absolute systemwide standards rather than on relative standards derived from the characteristics of each school's population. Defined in this way, that the criteria for admission and the procedures of identification are uniform from school to school, systemwide programs for retarded pupils can be classified as forms of tracking. In this sense, special systemwide programs for the emotionally disturbed, physically handicapped or neurologically impaired are "tracking." So are such plans as the IGC (Intellectually Gifted Children) classes at the elementary level, or the SP (Special Progress) classes at the junior high school level in New York City. Generally, the criteria for admission to special programs for the handicapped are more rigidly adhered to than those for admission to the gifted classes.

But "tracking" has another implication, especially as originally conceived for the high school level by Dr. Carl Hansen. It not only prescribes means for narrowing the ability range, it also delineates the major portion of the curriculum within each ability band or "track." In this fashion, tracking prevents a pupil from electing courses deemed "inappropriate" for one of his ability (too easy for the bright, too difficult for the slow) or courses wide of his academic goals (shop courses for the college bound, advanced academic courses for the "terminal" students). Thus, Washington students in the Honors track have to take 18 Carnegie units, of which 16 1/2 must be honors level courses distributed as follows: English (4 years), foreign language (4 years), math (3 years), sciences (3 years), and history and government (2 1/2 years). Such a program leaves a maximum of 1 1/2 credits for electives.

As one moves down from the Honors track, the number of units required for graduation decreases only by two, but the number of prescribed courses decreases far more. For the College Preparatory track only 10 1/2 units are prescribed; for the General track, only 6 1/2 units. In the Basic (or Special Academic) track, there is also a 6 1/2 unit academic requirement, but, in addition, 2 units of prescribed courses in business practices or shops (including home economics for girls) are also required.

A third characteristic of the Washington tracking plan derives from the pre-set uniformity of course requirements. Theoretically, all (or almost all) of a pupil's academic courses would fall at the same level. If a student is assigned to the Honors track, he must take a minimum of 16 1/2 honors level units; similarly, a College Preparatory student must carry at least 10 1/2 units of college preparatory level courses. A Special Academic track student is likewise placed in basic level classes in all academic subjects.

Tracking, then was intended to create a better "match" between the pupil's academic ability and performance and the level of academic work to which he is exposed, by means of:

1. Narrowing the range of abilities in any classroom;
2. Prescribing the scope and level of difficulty of each pupil's academic program so that he is unable to elect courses which might be either too easy or too difficult for him;
3. Maintaining each pupil at the level deemed most appropriate for him in all (or almost all) of his academic work;
4. Setting system-wide standards for admissions into each track and prescribing the curriculum appropriate for each level.

The chart below is drawn from one on page 195 of the Passow Report, and shows the percentage of pupils in the various curricula in the District's schools as of October,

1966. Particularly noteworthy is the extremely low percentage of pupils in the Special Academic (Basic) and Honors tracks.

| | <u>Spec. Acad.</u> | <u>General</u> | <u>Regular</u> | <u>Honors</u> |
|-------------------|--------------------|----------------|----------------|---------------|
| Level | | | | |
| Elementary | 2.3% | 96.4% | — | 1.3% |
| Junior High | 7.5% | — | 86.7% | 5.8% |
| Senior High | 3.4% | 53.3% | 37.8% | 5.5% |
| <u>All Levels</u> | <u>3.7%</u> | <u>68.4%</u> | <u>25.0%</u> | <u>2.9%</u> |

The trial judge has made his own exhaustive analysis of the track system in a fifty page monograph found in his opinion at pages 442 through 492. The defendants have given their proposed findings of fact on the subject. (Defendants' Proposed Findings of Fact F-1 through F-21; G-1 through G-28). Each of these detailed analyses presents a different educational point of view and each is commended to the attention of the court. Because of them it is unnecessary, in our opinion, to further encumber this brief with details of the workings of the track system as a form of educational ability grouping. We content ourselves here with the following brief summary of certain undisputed facts and of disputed issues:

1. The trial court stated that it "does not . . . rest its decision [outlawing the track system] on a finding of intended racial discrimination." The court bases its decision on a finding that "ability grouping as presently practiced in the District of Columbia school system is a denial of equal educational opportunity to the poor and a majority of the Negroes in the nation's capital." (Opinion 443).

2. The court has made the above finding in spite of the fact that in October, 1966, only 3.7 percent of all pupils in the District public schools were in the Basic or Special track, and only 2.9 percent were in the Honors track. All of the rest, Negro and white, were in the General and Regular tracks. (Passow Report 195)

3. The evidence discloses that there is such a high degree of correspondence between the social, economic and cultural background of a pupil and his test performance that for standardized test purposes, if these factors are controlled, the race of the examinee is unimportant. At any given income level, Negro children achieve as well as white children. Income of the pupil's family and not his race is the determining factor in his achievement level. (Dfts. Proposed Findings, G-16, 17).

4. The track system is being administered without any intent of racial or socio-economic segregation, and only with the purpose of classifying students by ability so as to increase the learning potential of all.

5. The track system program makes provisions for frequent testing, track changing and "cross-tracking" (or mixed tracking) of pupils. If there are any failures of flexibility in operation, this is due to inadequate supervision of principals and teachers.

6. Certain all Negro or predominantly Negro schools do not have adequate space for voluntary kindergartens. Over 100 children who wished to attend kindergartens were unable to do so in 1965. Approximately 345 children had to remain on a waiting list. (Ex. A-3, p. 10).

7. Certain schools do not have enough Honors pupils to warrant an Honors track. In such cases Honors pupils may go to other schools, but have to provide their own transportation.

8. The Board of Education is making a substantial effort to provide special compensatory education and extracurricular enrichment for the District's disadvantaged pupils. (Opinion 469-73, Dfts. Proposed Findings B-7-9, C-3, 4, Ex. 1, 25, 27, 126).

There is a temptation to add much more on this subject, but as we have indicated the trial court's opinion and the Defendants' Proposed Findings contain all the elaboration that is needed. After all is said and written, it is apparent

that the track system and its ancillary testing procedures represent a good faith effort on the part of the Board of Education to offer the maximum educational opportunity to all students in the District public school system. Whether or not it is the best ability-grouping method to accomplish this result is a question on which educators differ.

SUMMARY OF ARGUMENT

PART ONE

(Preliminary Issues)

1. The challenge to the standing of the appellants to maintain this appeal is without merit. It has been clearly held, in this very case, that the parents of school children have such an interest, by reason of their parenthood alone, as permits their participation in school segregation cases. If the appellees as plaintiffs had standing, the parent appellants have standing.

Mr. Smuck, as a member of the Board of Education, has a sufficient interest since his right to persuade his colleagues has been compromised. Dr. Hansen has an interest because he has been compelled to retire as Superintendent of Schools, as a result of the judgment below, and because he is so personally involved in the findings and conclusions of the court that he has a continuing interest as an individual in the litigation.

All of those who became appellants by intervention made their respective application within the time permitted for noting an appeal. Their interests were not represented, within the meaning of Rule 24a, Federal Rules of Civil Procedure, after the Board of Education determined to permit the judgment to stand by default.

2. The Chief Judge of this court was not authorized to separate the first cause of action from the other five causes of action when convening the three-judge court under Title 28, United States Code, section 2282. His sole duty and the extent of his authority, was to convene the court and

designate the judges. Rule 42 of the Federal Rules of Civil Procedure authorizes only the District Court to sever causes of action for trial. Rule 81 expressly excludes application of the Federal Rules to appellate proceedings such as these. Whether the Chief Judge is acting in an appellate proceeding or not in convening a three-judge court, he is not acting as a District Court Judge. Moreover, the entire scheme of sections 2281 and 2282 does not contemplate part of a case being tried by one group of judges, part by another judge, part on appeal to the Supreme Court of the United States, and part on appeal to the Circuit Court of Appeals. Such a splintering of a case violates due process.

3. Circuit Judge J. Skelly Wright, sitting as a District Judge, had no alternative except to disqualify himself, *sua sponte*, because his previously published commitment to the concepts which are threaded through his Opinion, Findings and Judgment deprived him of that impartiality, or appearance of impartiality, required to maintain the integrity and reputation of the federal judicial system. The filing of the motion by defendants for voluntary disqualification must be treated by the court as if it were an affidavit of prejudice.

PART TWO

(The Merits)

1. The trial judge found that the neighborhood school plan which defendants administered was created and has been retained without any purpose of separating children of one race from those of another. Furthermore, he recognized that the District of Columbia in the last fourteen years has undergone staggering shifts in population, in residential patterns and in pupil enrollment. These changes have produced racially concentrated neighborhoods whose schools necessarily reflect their racial composition. Moreover, they have produced 92.2 percent Negro student enrollment, thus rendering city-wide integration in meaningful terms mathematically impossible. Despite these facts, the trial judge

entered a decree indirectly, but inavoidably, requiring abandonment of the District's neighborhood school plan, and ordered substitution of a host of other pupil assignment and transfer schemes whose sole purpose is that of mixing Negro (or poor) and white (or affluent) students.

The trial court's action is contrary to the nearly unanimous conclusion of the federal courts that school boards have no constitutional duty to scrap neighborhood school plans for this reason. The Courts of Appeals for the Fourth, Sixth, Seventh and Tenth Circuits have so held in cases squarely presenting the question. Statements from opinions in school segregation cases in the First, Second and Third Circuits show the concurrence of these courts as well.

The basis of these decisions is that racial imbalance in the schools resulting from population and residence patterns does not fall within the constitutional prohibition of arbitrary *governmental* action. When a neighborhood pupil assignment plan is free of segregatory design, the fact that racial imbalance results from racially concentrated residential patterns does not violate the constitutional prohibition. These principles apply with full force in the present case.

2. The District's method of grouping pupils by their capacity to learn, determined by testing, and varying the curricula to suit their differing capacities was introduced into the schools here in the middle fifties to meet a genuine crisis—disparities in ability within a single grade or class so wide as to render that class unteachable as a unit. The trial judge held this system to be unconstitutional—not because it was created or administered with any purpose of segregation (which the court admitted it was not) but because it allegedly denied the plaintiffs equal educational opportunity.

The court's holding was rested on a novel judicial excursion into the validity and accuracy of pupil ability testing, the suitability of the curricula selected for the pupils, whether given percentages of movement between groups constituted flexibility or inflexibility, and other similar mat-

ters of educational policy. The court's conclusion was that the District's method of ability grouping did not work. The educators and administrators who created it were of the opposite conclusion. All other federal courts which have dealt with the matter have concluded that determination of these issues of educational policy must be left to the school officials, once it be shown, as it has been abundantly shown in this case, that the methods employed are not arbitrary and are not used for purposes of racial segregation. In venturing beyond this legal standard into determination of the actual merits of the District's system, the trial judge abandoned the role of a federal court determining questions of constitutional law and assumed the functions of a school superintendent and a Board of Education. The court's error here is rendered all the more serious by the resulting consequences for public education in our city.

3. The defendants have made strenuous efforts to achieve fully bi-racial teaching and administrative staffs. Progress has been consistent, and is continuing. There was no factual or legal basis for injunctive intervention by the trial court. The sledge hammer remedy of compulsory reassignment of teachers throughout the system had been considered by the school administration and rejected for a variety of well-founded reasons, not the least of which was the danger that teachers will resign and thus deepen the severe problem of keeping the schools adequately staffed. Furthermore, no teacher was a party to this case from the date of trial on, a fact which by itself makes the court's order for compulsory transfers improper.

ARGUMENT

PART ONE

(Preliminary Issues)

Before this Court reaches the merits of the several appeals herein, there are several major issues which have been raised by the parties. The Appellees have challenged the standing of Appellants by a motion to dismiss the appeals of all Appellants, and Appellants have moved on several grounds to reverse and remand the Judgment of the court below with directions to vacate the same.

I

**Appellants Have Standing and Their
Appeals Are Timely**

Notwithstanding the Opinion of Judge Wright filed February 19, 1968, these Appellants find it difficult to take seriously the challenge made to the right of the parent-appellants to intervene for the purpose of appealing, on the record below, the Judgment of this Court entered June 19, 1967. It would appear that this identical challenge, when made by the United States Attorney on behalf of the District Court Judges, and also by the Corporation Counsel, for the other defendants, was disposed of by Judges Fahy, Miller and Wright in *Hobson v. Hansen*, 265 F.Supp. 902. We hardly need more authority than the language of that Opinion where the court said, at page 906:

“Plaintiffs are not mere federal taxpayers, as were the plaintiffs denied standing in *Frothingham v. Mellon*, 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078. They are closely involved as pupils, or as parents and guardians who have the right to direct the education of children under their control, *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535, 45 S.Ct. 571, 69 L. Ed. 1070 and the education of children is an important function of state and local governments. *Brown v. Board of Education*, 347 U.S. 483, 493, 74 S.Ct. 686, 98 L.Ed. 873. Defendants concede plaintiff's

standing to contest the manner in which the Board administers the schools. It is but a short step to standing also to challenge the constitutionality of the basic authority of the Board to do the administering. Unless persons in the position of plaintiffs have standing to do this the issue may escape resolution. * * *

The application of the parent-appellants for leave to intervene was made under Rule 24(a) of the Federal Rules of Civil Procedure, upon the authority, in addition to *Hobson v. Hansen, supra*, of such cases as *Wolpe v. Poretsky*, 79 App.D.C. 141, 144 F.2d 505 (cert. den. 65 S.Ct. 190); *Textile Workers Union of America v. Allendale Co.*, 96 U.S. App.D.C. 401, 226 F.2d 765; *Pellegrino v. Nesbit*, (9th Cir. 1953), 203 F.2d 463; *Kozak v. Wells*, (8th Cir. 1960), 278 F.2d 104; and *Cuthill v. Ortman-Miller Machine Co.*, (7th Cir. 1954), 216 F.2d 336. So far as the parent-appellants are concerned, they have taken the position, through their counsel, that the allegations of their motions for leave to intervene needed no further statement of facts relating to their interest in the proceedings than that they were parents of children in the schools of the District of Columbia. Counsel took it that this is all that is required on the basis of the Opinion of the three-judge court above referred to and quoted; and it would seem that this is the law of the case, and that the appellees are estopped to take a contrary position. It would have been prolix and redundant to recite, after a firm statement that they dissent from the rulings of Judge Wright, that they considered that the Board of Education was the proper forum for the determination of most of the matters involved in Judge Wright's Opinion, that their children were entitled to attend the neighborhood school if the Board of Education deemed that system wise for the District school system, that their children are entitled to have the Board of Education free to adopt a system of ability grouping in good faith without interference by the courts, and that their children are entitled to have teachers assigned for reasons of educational policy and not solely for the pur-

pose of providing some obviously impossible racial balance. In simple terms, the appellees, as plaintiffs below, claimed as a class of Negro parents and children, that the acts of the Board of Education in these matters violated their constitutional rights; while the parent-appellants assert just the reverse, that is, it would violate their constitutional rights to prevent the Board of Education from exercising its untrammelled judgment with respect thereto.

Carl C. Smuck is a member of the Board of Education and he, too, claims an interest in that the Board on which he sits is no longer free to exercise without inhibition its best judgment by reason of Judge Wright's injunction. He contends that, in the councils of the Board of Education he is entitled to a free opportunity to persuade his fellow members of the Board that the policies prohibited are in fact wise and sound educational policies, or that other members of the Board are entitled to persuade him to the contrary. Such free discussion, debate and decision in the councils of the Board of Education have been foreclosed by the injunction. It is no argument to say that he is bound by the decision of the Board of Education not to appeal; as a matter of fact, if the Judgment of Judge Wright is erroneous, the decision not to appeal is *ipso facto* erroneous, and constitutes an unlawful acquiescence in a jurisdictional interference in the statutory duties of the Board of Education.

Dr. Hansen would still be Superintendent of Schools if Judge Wright's Opinion and Judgment of June 19, 1967 had not been entered and if the Board of Education had not forbidden him to appeal in that capacity. Therefore, if the Judgment of the Court was in error, the order of the Board of Education was also in error. If the foregoing reasoning is sound, Dr. Hansen has standing both in his official capacity and in his individual capacity. The attempt of Judge Wright in his Opinion of February 19, 1968 to distinguish the principles of *Blassie v. Kroger Co.* (CC 8th, 1965) 345 F.2d 58, do not appear valid. In that case, as Judge Wright notes, the trustee-appellant was held

to have a right to appeal because the judgment and decree would operate against him in his individual capacity as well as in his official capacity, if he had remained trustee; but likewise, in the case at bar, the injunction is both personal and official as to Dr. Hansen if he had remained the Superintendent of Schools. Since, but for the Judgment and Decree and the wrongful act of the Board of Education in prohibiting his appeal, he would still be Superintendent of Schools, he has such interest as will entitle him to maintain this appeal. The *Blassie* case, *supra*, also stands for the principle that Dr. Hansen has an interest because his acts and conduct as Superintendent of Schools are so completely bound in the decision of the Court, and in its Findings of Fact and Conclusions of Law, that he is sufficiently personally involved to give him standing.

Judge Wright's Opinion of February 19, 1968 is remarkable in that it recites a long list of objections to the standing of the proposed intervenors, now appellants, and reasons why their intervention should be denied, but then grants the motion. A mere reading of the Opinion, it seems to us, typifies the broad, liberal and basic approach he has given throughout the case to the position of the appellees, and his narrow and highly literal position with respect to that of the appellants. For example, he refers to the parent-appellants as

"parents of a handful of students who for unspecified reasons 'dissent from' the decree and who have not even alleged how they are affected by it."

What would it matter if there were only one dissenting parent? Would it have mattered if only one Negro child were plaintiff? The Board of Education did not determine that it would not appeal and enter an order forbidding Dr. Hansen to appeal for quite some time after the entry of the Judgment; and it is remarkable that so many parents turned up in a ten-day period ready and willing to bring this highly controversial Opinion to the point of appellate review after the Board of Education had seemingly abdicated

its functions to the Court. Furthermore, did Judge Wright really think that the reasons for their dissent from his Judgment were in the least obscure? He ignored the Statements of Points on appeal then already in the record. When he suggests that their motion does not recite specific instances how the Judgment would affect their children, was he unaware that at the time of the preparation and filing of the motion, which had to occur before the time for appeal expired, no action had been taken by the Board in implementation of the Judgment? Obviously the parents sought to intervene in contemplation that so long as their children were in public schools they would be affected by being denied the right to have the Board of Education prescribe ability-grouping by the track system or some other method, that their children may be compelled to attend schools out of their own neighborhoods, that teachers would be assigned on the basis of race and not upon ability or other valid educational policy, etc.? Judge Wright, taking a highly literal view of Rule 24(c) makes a point of the fact that the motions to intervene are not accompanied by a pleading setting forth the claim or defense for which intervention is sought; but he makes no mention of the fact that the motions ask leave to intervene for the purpose of appealing on the record already made, and expressly recited that their motion should be taken as a notice of appeal. The only pleading, under such circumstances, necessary to appeal on the record already made would have been a notice of appeal, and the requirements of Rule 24(c) must therefore be deemed to have been met. Judge Wright complained³ that

³It would have served no purpose to list the children of the parent-appellees, their ages, the school attended. The injury is prospective: Whatever their age, number, sex, school or grade they will always, if this judgment is not reversed and vacated, suffer risk that they will not be allowed to go to school in their own neighborhood among their own friends, that they will be deprived of many if not all the advantages of curricula adjusted to their respective abilities that their teachers will be chosen by race, and unhappy (whether Negro or white) in their assignments.

the parent-appellants did not state the reasons for their dissent, thus suggesting that they have not met the requirement of Rule 24(c) that the intervention "should state the grounds therefor." This highly technical view avoids the obvious: That the parent-appellants at that point sought to take the position the Board of Education had taken throughout the litigation and until it elected to abandon the defense so that the grounds for their dissent are spread on this record, from one end of it to the other. It would seem that a court impartially approaching the position of the appellants with the same degree of understanding as exercised in the case of the appellees, would have recognized no doubt concerning the existence in the record of the grounds for dissent on the part of the parent-appellants.

We respectfully submit that all of the appellants have amply demonstrated such interest as to require that the motion to dismiss their appeals should be denied.

II

Appellants' Motion To Reverse and Remand Should Be Granted

The motion of appellants to Reverse and Remand is in two parts: First, it asserts that the trial before Judge Wright while the case was pending before a three-judge constitutional court was in error. Second, it asserts that Judge Wright erred in failing personally to disqualify himself.

A.

Separation of the First Cause of Action Was Error

The Deceptively Plausible Concept That the First Cause of Action Can Stand Alone Is Not Sound.

In Count I of their Complaint, plaintiffs alleged that D.C. Code, § 31-101, vesting power in the U.S. District Court judges to nominate and appoint the members of the Board of Education was unconstitutional in that it contravened

Article II, § 2, clause 2, of the United States Constitution. In Counts II through VI of their Complaint, after alleging that these defendants-appellants, *inter alia*, were vested with the "establishment, maintenance and administration" of the public schools, and that the schools were under their "direct control and supervision,"⁴ plaintiffs further alleged that the schools had been so operated as to "discriminate" against the plaintiffs "solely because of their race and/or color, *all in violation of the Fifth Amendment to the Constitution.*" (emphasis supplied). They prayed, *inter alia*, that the District Court notify the Chief Judge who would designate two other judges "to hear and determine *this action*," (emphasis supplied) as required by Title 28, U.S.C., § 2282, and, thereafter, that such court "issue a permanent injunction forever restraining and enjoining" appellants, *inter alia*, from the specified acts of discrimination.

Title 28, U.S.C., § 2282, provides in its entirety:

"An interlocutory or permanent injunction restraining the enforcement, operation, or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title." (emphasis supplied).⁵

⁴D. C. Code, §§ 31-102 *et seq.*

⁵Cf. Title 28, U.S.C., § 2281:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title." (emphasis supplied).

Notwithstanding plaintiffs' prayer for a three-judge court to hear and determine "this action," Circuit Judge Wright, sitting by designation, by an Opinion and Order filed March 25, 1966, notified Chief Judge Bazelon that a three-judge court was required to determine whether D. C. Code, § 31-101, was an unconstitutional act of Congress, without mention of the claims of the alleged unconstitutional enforcement, operation or execution of the succeeding sections of the same statute. In an Order filed March 29, 1966, the Chief Judge found that only the "first cause of action" required the convening of a three-judge court, made designation of an additional two judges for such a court, and remanded "causes of action" two through six to Circuit Judge Wright.

On May 16, 1966, these defendants-appellants moved the three-judge court so convened to assume jurisdiction of the entire case, and simultaneously moved Chief Judge Bazelon and Circuit Judge Wright to act consistently therewith. The three-judge court and Circuit Judge Wright denied the motions respectively addressed to them in one-page Orders filed June 1, 1966, upon the identical ground that the Chief Judge's convening Order of March 29 had determined the limits of the jurisdiction of the three-judge court. In a five-page Order filed the same date, Chief Judge Bazelon declined to modify his convening Order on the ground that only Count I "asserts unconstitutionality" as grounds for enjoining enforcement of an Act of Congress, the remaining counts merely seeking abatement by injunction of "various racial and economic discriminations by school authorities."

In *Florida Lime & Avocado Growers v. Jacobsen*, 80 S.Ct. 568, 362 U.S. 73, 4 L.Ed. 2d 568 (1960), the Court reversed dismissal of an action to enjoin California health officers from systematically excluding Florida avocados from California markets while purportedly enforcing a statute prohibiting the sale or importation of avocados having less than a specified minimum oil content. The plaintiffs contended that the statute violated the "commerce" and "equal pro-

tection" clauses of the United States Constitution and, further, that the California statute was in conflict with a federal statute relating to the same statute. In determining, as a threshold question, its jurisdiction to entertain a direct appeal under the equivalent three-judge court statute relating to injunctions against enforcement, operation, or execution of State statutes, the Court said:

"* * * Cases in this Court since *Louisville & N. R. Co. v. Garrett*, 231 U.S. 298, 58 L.Ed. 229, 34 S.Ct. 48 (1913), have consistently adhered to the view that, in an injunction action challenging a state statute on substantial federal constitutional grounds, a three-judge court is required to be convened and has—just as we have on a direct appeal from its action—jurisdiction over *all* claims raised against the statute. These cases represent an unmistakable recognition of the congressional policy to provide for a three-judge court whenever a state statute is sought to be enjoined on grounds of federal unconstitutionality, and this consideration must be controlling." 362 U.S. 80-81. [Emphasis added]

Without citing the *Florida Lime Growers* case, in *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713 (1962), the Court remanded to the District Court with instructions to take action to convene a three-judge court to hear an action seeking to enjoin the application of a New York retail liquor licensing statute to the plaintiff on the ground that the statute so applied violated the "commerce," "export-import," and "supremacy" clauses of the United States Constitution.

Both the California and New York statutes were innocuous as written, allegedly repugnant to the Constitution only in their particular application to the plaintiffs.

Neither case made mention of two older cases, *Ex Parte Bransford*, 310 U.S. 354 (1940), and *Phillips v. United States*, 312 U.S. 246 (1941), holding a three-judge court unnecessary in cases in which the plaintiff complained of an unconstitutional "result" rather than the invalidity of

the statute itself. Those cases were, however, relied upon by the Government in disputing the necessity for a three-judge court in *Zemel v. Rusk*, 381 U.S. 1 (1965), an action challenging the validity of the denial of a passport validation, notwithstanding the difference in statutory language between the state-injunction and federal-injunction statutes. The court refused to decide whether those cases applied, holding that a "substantial" question as to the constitutionality of the legislation as written was presented, thus requiring the three-judge court. It went on, in a footnote, however, to state:

"The convening of a three-judge court in this case surely coincides with the legislative policy underlying the passage of § 2282:

'The legislative history of § 2282 and of its complement, § 2281. . . indicates that these sections were enacted to prevent a single federal judge from being able to paralyze totally the operation of an entire regulatory scheme, either state or federal, by issuance of a broad injunctive order. . . Repeatedly emphasized during the congressional debates on § 2282 were the heavy pecuniary costs of the unforeseen and debilitating interruptions in the administration of federal law which could be wrought by a single judge's order, and the great burdens entailed in coping with harassing actions brought one after another to challenge the operation of an entire statutory scheme, wherever jurisdiction over government officials could be acquired, until a judge was ultimately found who would grant the desired injunction.' *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 154-155, 9 L.ed.2d 644, 653, 83 S.Ct. 554. Appellant in this case does not challenge merely a 'single, unique exercise' of the Secretary's authority, cf. *Phillips v. United States*, *supra*, 312 U.S. at 253, 85 L.ed. at 806. On the contrary, this suit seeks to 'paralyze totally the operation of an entire regulatory scheme,' indeed, a regulatory scheme designed and administered to promote the security of the Nation." 381 U.S. 7.

These defendants-appellants were, on January 13, 1966, when the Complaint was filed, and on June 19, 1967, when judgment was entered, the Superintendent of Schools and a member of the Board of Education, charged by the District of Columbia Code with operation of a "regulatory scheme" no less comprehensive than those attacked in *Zemel v. Rusk*, *supra*, and *Florida Lime & Avocado Growers v. Jacobsen*, *supra*. Appointments, promotions, transfers, or dismissals of virtually any important school personnel may be made by the Board of Education only upon the written recommendation of the superintendent. D.C. Code, § 31-102. Circuit Judge Wright found that the actions of defendants-appellants in execution of that section to have been "infected with unconstitutionality" since 1954 (*Hobson v. Hansen*, 269 F.Supp. 401, 503) and ordered them to commence "substantial teacher integration" by October 2, 1967. *Id.* at 517. The Board of Education is given control of general policy relating to the schools, D.C. Code, § 31-103, and the Superintendent is given direction of and supervision in all matters pertaining to the instruction in all schools, D.C. Code, § 31-105. Circuit Judge Wright found the "neighborhood school," the "optional zone," and the "track" systems, as implemented by the defendants-appellants under the powers conferred by the foregoing D.C. Code Sections to be unconstitutional, *Hobson v. Hansen*, *supra*, *passim*, and issued a permanent injunction both prohibiting their continuation and ordering corrective action. *Id.*, at 517.

It would be difficult to conceive of a regulatory scheme more effectively paralyzed than that established by Congress to operate the public school system and then enjoined in its essential operations by Circuit Judge Wright. Upon the legislative history discerned by the Supreme Court in the cases cited above, the instant case certainly seems to fall within the purpose of the three-judge court statute to prevent a single Federal judge from constricting the operations of governmental officers and agencies by an all-encompassing finding of "repugnance" to the Constitution therein,

irrespective of whether it is Congress' language, or the execution of the statute by the officials so charged, which is said to be unconstitutional. To hold that a three-judge court is not required in the latter case would permit a plaintiff, or a judge so disposed, to evade the three-judge requirement as effectively as the interpretation rejected in *Florida Lime Growers*, simply by drawing or interpreting the Complaint to be a constitutional assault upon mere "administrative discretion" rather than the enabling legislation itself, leaving the latter an abstract form of words although unimpugned.

The evil is not averted by leaving it to the discretion of the Chief Judge as to when the claim for relief requires the convening of a three-judge court. The statute empowering the Chief Judge to convene the three-judge court expressly confers only the power to

"... designate two other judges, at least one of whom shall be a circuit judge."

The statute then continues:

"Such judges shall serve as members of the court to *hear and determine the action or proceeding.*" Title 28, U.S.C., § 2284 (emphasis supplied).

The clear implication of the statute is that when a three-judge court is appointed, it is up to that court, not the chief judge of the appellate court, to deal with all matters relating to the action, including the usual initial determination of its jurisdiction. *United States v. United Mine Workers*, 330 U.S. 258 (1947). It was so held in *Whitney Stores, Inc. v. Summerford*, 280 F.Supp. 406 (1968). Again, to hold otherwise once more would permit the "single federal judge" (in this case a chief judge) to "... paralyze the operation of an entire regulatory scheme" by the subtle device of an *ex parte* order limiting the issues he chose to refer to the three-judge court, an order comparable to the "broad injunctive order" of the single district judge Congress sought to control.

The Procedural Dilemma Concerning The Identity of the Trial Judge.

The Corporation Counsel vigorously opposed the separate hearing of Count I; and he was equally vigorously supported by logical implication by the United States Attorney representing the defendant-judges. We refer to these two briefs and adopt them and rely on them. In substance the Corporation Counsel flatly took the position that the entire case, or none, should go for trial to the three-judge court; and the United States Attorney asserted that any convening of the three-judge court was premature since the case might very well be decided on the issues drawn with respect to the other Counts; that the Court should not reach out to decide constitutional matters, but should only decide them as they arise; and that, if the appellees (plaintiffs below) were incorrect in their charges in Counts II through VI, they would have no standing to raise the issues involved in Count I alone. We think these contentions were sound, and failure on the part of the three-judge court and Judge Wright to sustain them was clear error. The last paragraph of the brief of the United States Attorney is especially called to the attention of the Court:

“Upon the Three-Judge-District Court, or the District Court of Three Judges,⁷ taking this action, we believe, the remainder of the case properly should be referred for disposition by the District Court in normal course.⁸ There will then be no further necessity, under 28 U.S.C. 291(c), to burden further any Circuit Judge with this District Court matter.

⁷*I.e.*, if the Three-Judge-District Court concludes that no substantial constitutional question is presented in the complaint to warrant its convention as such.

⁸We believe this case presents but a single ‘cause of action.’ The effort made in the complaint to divide it into separate ‘causes of action’ does not bear analysis. And we think it was error on the part of the Chief Judge of the Court of Appeals to bifurcate this unitary action by his order filed March 29, 1966. Nevertheless, under the view we take of this matter, we do not see that this affects the further course we suggest be taken in this case.”

There were not two lawsuits, only one. The defendants were entitled to have the case tried as a single lawsuit. If Count I had not been in the Complaint, the District Court judges would not have been disqualified to try the case. If Count I did not state a cause of action, there was no need to name the District Court Judges as defendants; and there was no reason to designate Judge Wright for the purpose of hearing part of the case. In any event, there was no showing that the designation of Judge Wright needed to go beyond the first stage of a reference to the Chief Judge for the convening of a three-judge court. There is a clear dilemma: If this case is two lawsuits there was no lawful reason for the designation of Judge Wright to try the second one; if it is a single lawsuit, the case was before the three-judge court, and Judge Wright had no lawful jurisdiction to proceed. If it is argued that the severance for trial is permitted by Rule 42(b) F.R.C.P., the answer is that this rule permits severance by a district judge and does not authorize severance by the Chief Judge of the Circuit Court of Appeals. See Rule 81 F.R.C.P.

A three-judge constitutional court, in *Turner v. Goolsby*, 255 F.Supp. 724 (1966), had before it the question whether the court had jurisdiction of and would try counts of a complaint which did not directly involve the validity of a statute. There, the court held that it had jurisdiction of the other counts; and relied upon *United Mineworkers of America v. Gibbs*, (1966) 86 S.Ct. 1130, 383 U.S. 715, 16 L.Ed. 2d 218, that it was within its sound discretion, i.e., that of the three-judge court, to take jurisdiction of the entire case. Thus, if there is a discretionary right to limit the jurisdiction of the three-judge court, that discretion does not lie with the Chief Judge of the Circuit Court of Appeals, and it does not lie with the single District Judge. In the case at bar, the three-judge court dealt only with Count I, not by reason of the exercise of its discretion so to do, but because only Count I was referred to it. This was the error which made it possible for a designated judge to try a case where the reason for the designation of the judge was held

not to exist. Looking at it from the vantage point of two years later, it appears to have developed into a ploy to enable appellees to face this Court with a *fait accompli*.

H

The Trial Judge Was in Error in Failing To Recuse Himself for Bias or Prejudice Upon the Motion of the Defendants

On or about September 30, 1966, the defendants filed a pleading entitled "Motion for Voluntary Displacement" by which they suggested that Circuit Judge J. Skelly Wright recuse himself voluntarily from presiding further, on the ground that he was prejudiced as to both the facts to be found in and the law applicable to the case. They offered, in support of that Motion, certain exhibits, *inter alia*, an article entitled "*Public School Desegregation: Legal Remedies for De Facto Segregation*," appearing at 40 N.Y.U. L. Rev. 285 (1965), purporting to be the text of a lecture delivered by Judge Wright on February 17, 1965, at the New York University School of Law. A substantial portion of the lecture was reprinted in a *Symposium on De Facto School Segregation*, 16 W.Res. L.Rev. 478 (1965). Other exhibits purported to be articles which had appeared in various publications throughout the country commenting upon Judge Wright's apparent predilections upon the issues presented in this case, and questioning the propriety of his continuing as the presiding judge. The law review article, and some of the public comments thereon, are a part of the record before this court.

The principal thrust of Judge Wright's article in the *New York University Law Review* is a statement of his personal disapproval, expressed in strong terms, of what he perceived to be the timidity of other courts to *find* and outlaw "*de facto* segregation" in the schools, i.e., segregation existing as a result of causes other than so-purposed policies and practices of those charged with operating the schools in any given community. Judge Wright's article makes clear that he had, within the year before the case was filed, already

concluded that the courts must put an end to such "*de facto* segregation" as a denial of the constitutional rights of Negro children, and that the "neighborhood" schools must be abolished where they result in "imbalance" of the racial makeup of the schools in relation to the total racial composition of the community. He also indicated his antipathy for persons whose deficient "sense of social and racial justice" would permit them to make the arguments by which these defendants later sought to persuade him. 40 N.Y.U. L.Rev. 298. In such circumstances, it is submitted that the vice of the situation is that any judge who has committed his views to such wide publication, cannot easily retreat from them when plaintiffs, in effect, ask him to demonstrate that his courage equals his published convictions by awarding them the relief prayed.

The Motion for Voluntary Displacement was not termed an "Affidavit of Bias or Prejudice," as defined by 28 U.S.C.A., § 144. It should, however, have been treated as such, *de facto* if not *de jure*. This case is not merely a dispute between litigants whose several claims to property rights affect only themselves. Not only did plaintiffs intend this lawsuit to bind persons not nominally parties to it, the issues they ask the Court to resolve are matters in which the whole public, local and national, has an immediate and drastic interest. A suggestion of bias in any form should have been acted upon accordingly by the judge to whom it was addressed, whether or not counsel called it an Affidavit of Bias or Prejudice. If counsel for the defendants, out of a greater sense of respect for Judge Wright, called his motion by some less odious name, no advantage can or should be taken of the deference so shown. And, if doubt of the impartiality of the judge existed in the mind of counsel—or, more importantly, in the mind of clients—it was their duty to file an Affidavit of Bias or Prejudice, the sensibilities of the impugned party notwithstanding. *Campbell v. United States*, 126 U.S.App.D.C. 250, 377 F.2d 135 (1967). The motion was apparently denied orally from the bench on the ground that the pleading had been filed as the

"culmination" of a "... concerted effort to delay [the trial] ... to frustrate prosecution, the administration of justice." (Tr. 2285-2286). It is submitted, however, that in such a case as this, this motion could never come too late.

But even if Judge Wright was psychologically capable of fairly weighing the evidence, and determining and applying the law, disregarding his previous expressions on the subject, substantial doubt as to that capability has been and still is being voiced by those who make the opinions of the community. It is not enough that the case be, in fact, decided fairly and impartially. The circumstances under which it is decided must give the *appearance* of fairness and impartially, or the confidence of the community in the integrity of the entire judicial system is impaired. It cannot be better stated than the following quotation cited and quoted by the majority of the three-judge court (265 F.Supp. 917):

"A fair trial in the fair tribunal is a basic requirement of due process. Fairness, of course, requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a possible temptation to the average man as a judge ... not to hold the balance nice, clear and true between [the parties] denies ... due process of law.' [Citation omitted.] Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.'" Black, J., in *In Re Murchison*, 75 S.Ct. 623, 625; 349 U.S. 133, 136; 99 L.Ed. 942 (1955).

The appellants and petitioners for intervention submit that Judge Wright's publicly-announced suspicion of the facts the defendants sought to prove, and his repugnance to the law applicable thereto urged upon him by the defendants, placed his personal disinterest in the outcome substantially in doubt in the community at large. We need go no further than Judge Wright's own dissenting opinion in *Hobson v. Hansen*, 265 F.Supp. 902, 931-2. It would follow from his own principles that he had a duty to recuse himself, if only to preserve the appearance of justice. See *United States v. Ritter*, 273 F.2d 30; *Occidental Petroleum Corporation v. Chandler*, 303 F.2d 55; *Texaco, Inc. v. Chandler*, 354 F.2d 655; *United States v. Valenti*, 120 F.Supp. 80 (1954).

Because all of the judges of the United States District Court for the District of Columbia were sued, including those who had never participated in appointing a member of the Board of Education, they were thereby all disqualified. Just why they were necessary parties does not appear. Nevertheless, it is odd that the judge designated to try the case did not consider himself disqualified notwithstanding his unequivocal expressions of prejudgment, indicating an actual, not implied, possibility of prejudice.

The evidence in this case was, the record demonstrates, subject to wide differences of interpretation and reporting. This is evident in three documents in this record: The Proposed Findings of Fact tendered by the respective parties and the Findings and Conclusions of the Court. Judge Wright's published statements suggest a predisposition in the very matters in which he was asked to make findings of fact and conclusions of law upon only the evidence before him. It is hardly possible that he could have ignored the former in making his assessment of the latter.

Appellants rely upon the rule laid down by this Court in *Texaco, Inc. v. F.T.C.*, 118 U.S.App.D.C. 366, 336 F.2d 754, reversed on other grounds, 85 S.Ct. 1798; 381 U.S. 739, 14 L.Ed.2d 714. And see, *American Cyanamid Co. v. F.T.C.* (CCA 5th) 363 F.2d 757 (1966).

The argument on this point is made with considerable sympathy for the man or woman who sits as a judge. One does not become a judge if his mind is not actively concerned with public questions. But if he accepts the office, he must sacrifice public commitment on questions which may come before him. If he has privately formed an opinion he must at least be spiritually free to change his mind. Advocates have sufficient reason to assume judges frequently have some preconception of a legal controversy, particularly a prominent public one. But all advocates assume the judge can be persuaded. He is less likely to be persuadable if he has gone on public record, out of court, without adversary presentation, on the issues of a case before him. If he has indulged himself in that intellectual exercise, he must disqualify himself from sitting in a case directly involving the matter.

PART TWO (The Merits)

I

The District of Columbia's Neighborhood School Plan Was Neither Created nor Maintained With Any Purpose of Segregation; Its Use Does Not Violate the Constitution

A

The Present Ills of the District's Schools - Cause and Cure

That the present ills of public education in the District of Columbia are tragic no informed person can deny. But a correct diagnosis of the cause must precede any remedy, lest in our haste to cure, we only weaken the patient even more.

The huge influx of Negroes from the rural sections of the deep south without those skills which might enable them to adjust to city life, the flight of middle class whites to the Virginia and Maryland suburbs, the paucity of Congressional appropriations for public education (including school build-

ing construction), these and many other factors have played their role in bringing the District's school system to its present state.

The present degree of racial separation in our schools is but one symptom of the deeper social malady. Before *Brown v. Board of Education* and *Bolling v. Sharpe*, the District's schools were segregated, by law. After these decisions they were promptly integrated, both in law and in fact. Today, while still complying fully with the Supreme Court's mandate that they be integrated in law, these schools have become highly re-segregated in fact. The cause is to be found elsewhere than in defendants' educational policies.

The year before *Brown* and *Bolling*, the District's population was 60 percent white, 40 percent Negro. By 1965 it was 40 percent white, 60 percent Negro. At the time of *Brown* and *Bolling*, the District's public school enrollment was 57 percent Negro. At the time of Judge Wright's decision from which this appeal is taken, it was 90 percent Negro. Now, in the single year since that decision, almost one-fifth of the remaining white pupils have left the city's public schools, thus increasing the proportion of Negroes to more than 92 percent of the total.

Clearly we are confronted here with a social sickness which requires something other than judicial surgery.

One cannot read Judge Wright's opinion without sharing his grave concern over this malaise that has infected our urban society—a malaise which is threatening spiritual strangulation of our disadvantaged citizens and of the city in which they reside.

But the surgery which the distinguished trial judge has here prescribed results from a faulty diagnosis—a confusion between cause and effect. The present low educational attainment of many Negro school children in Washington is the result of generations of social deprivation, in housing, in employment, in cultural background,—not in the District's 1965-66 educational system. The judicial surgery which the

trial judge has prescribed can only result in a spread of the malaise itself, and will tend to reduce the educational achievements of the better students, of both races, to the lowest common denominator of all. It cannot promote equal educational opportunity or further the "equal protection of the laws" under our Federal Constitution.

Insofar as Washington's educational sickness is now susceptible of cure by governmental remedies, such remedies (with minor exceptions hereafter discussed) must be prescribed by the legislative and executive doctors, and not by the judges. The medicines need to take the form of *more than equal* compensatory education for the disadvantaged, of special nutrition programs, of special and remedial teaching (in and out of school) of the types which the Board of Education had sought to implement before this suit was begun. These medicines can be made possible only through Congressional appropriations. And to get at the root of the disease, Congress must also inaugurate massive long term "healing" programs of the kinds such as those recommended in the recent report of the National Advisory Commission on Civil Disorders.

The trial judge expressed regret "that in deciding this case this court must act in an area so alien to its expertise." (Opinion 517.) As we shall attempt to point out below, it would appear that in the court's natural desire to "do something" to remedy Washington's educational sickness, it went far afield in erroneous and unwise judicial action. Never more truly than here can it be said that "hard cases make bad law." And when, as here, the remedies are wide of the mark, they also make bad results.

Early in 1965 at the request of the Board of Education, the Teacher's College of Columbia University undertook a comprehensive fifteen months study of the District's public schools. The results of this study are embodied in a book of approximately 600 pages entitled "*Toward Creating a Model Urban School System: A Study of the Washington, D.C. Public Schools*," commonly called the "Passow Report,"

after the study director, Dr. A. Harry Passow. The preliminary report on the study was published in June, 1967, almost simultaneously with Judge Wright's decision in this case. The Passow study was conducted over a 15 month period by 33 task forces, each dealing with a specified problem area. There were 81 task force chairmen and consultants, 97 graduate assistants and students and a resident staff of six research assistants. They visited schools and classes; interviewed students, staffs, parents, community members and school and community leaders; administered questionnaires and inventories to pupils and staff members; examined pertinent public records and other school data; studied reports and records from other agencies, governmental and private; and drew on appropriate data sources wherever they could be found.

In its final report, which has been referred to above, the Passow study group impliedly rejected what we submit is the underlying theme of Judge Wright's opinion, namely, that all children should be offered essentially the same type of education and, somehow, brought to the same level of achievement and ability. The following statement appears on page four of the summary findings in the report:

The issues around which controversy in Washington has centered recently—i.e., the track system, *de facto* segregation and racial imbalance of students and staff, the proportion and assignment of "temporary" teachers and the location of new schools—are peripheral but symptomatic of the District's crisis. The more central question before the Washington community and its schools is: *What are the educationally relevant differences which the District's pupils bring into the classroom and what kinds of varied educational experiences must be provided by the schools to accommodate these differences?* In understanding this question the schools will be in a position to seek the parameters of urban education and work toward developing a model urban school system.

* * * *

* * * Differentiated instruction based on differentiated needs is at the heart of *both equality and quality*. This is where the schools must focus their efforts while, concurrently, other agencies and institutions are bringing about social and physical renewal to the District of Columbia. (Emphasis in the Report).

The medicine recommended in the Passow Report is very different from the surgery ordered by the trial court. But it is the only medicine which may cure the patient.

B

The District's Neighborhood School Plan and the Constitution

In its opinion, the trial court conceded that "the neighborhood [school] policy is accepted and in general use throughout the United States," and stated that because of this fact and "the 10 to one ratio of Negro to white children in the public schools of Washington" the court would not bar its use "at this time" (Opinion 515).

The trial court, as we have said, also stated that the evidence does not "show that in any real sense the Board of Education has adhered to the neighborhood policy with a segregatory design" (Opinion 419). And there was no evidence that the Board of Education acted arbitrarily in fixing school boundaries.

Nevertheless, the court has proceeded to emasculate the District's neighborhood school policy by the following orders directed to the Board of Education:

1. The court has directed the Board to file for approval by the court "a plan for pupil assignment eliminating the racial and economic discrimination found to exist in the operation of the Washington public school system" (Opinion 407, 517).

2. The court ordered the Board to bus volunteering children out of their neighborhoods east of Rock Creek Park to "underpopulated schools" west of the Park (Opinion 407, 517).

3. The court ordered the abolition of certain optional school zones which the Board had established to minimize overcrowding, on the ground that this had "racial" implications (Opinion 407, 517).

The first two orders of the trial court, referred to above, are radically destructive of the neighborhood school principle. When read in the light of the court's entire opinion, the conclusion is inescapable that this is exactly what the trial judge wanted to achieve. (See, e.g., Opinion 508-10). Judge Wright's decree, drastically modifying and in fact almost destroying the District's neighborhood school plan, is contrary to the outstanding decisions of the Federal appellate courts.

After *Brown v. Board of Education* was remanded by the Supreme Court to a three-judge court in Kansas, the latter court declared:

"It was stressed at the hearing that such schools as Buchanan are all-colored schools and that in them there is no intermingling of colored and white children. *Desegregation does not mean that there must be intermingling of the races in all school districts. It means only that they may not be prevented from intermingling or going to school together because of race or color.* (Emphasis added.)

Then, focusing squarely on the question of the neighborhood school, the court held:

"If it is a fact, as we understand it is, with respect to Buchanan School that the district is inhabited entirely by colored students no violation of any constitutional right results because they are compelled to attend the school in the district in which they live." 139 F.Supp. 468, 470 (1955).

The United States Courts of Appeals for the Fourth, Sixth, Seventh and Tenth Circuits have all rendered similar decisions in cases squarely presenting the issue of *de facto* segregation. While the issue has not been framed by any case before the Courts of Appeals for the First, Second and

Third Circuits, statements from their opinions show that they are in agreement with the position of the Fourth, Sixth, Seventh and Tenth Circuits. There follows a discussion of these decisions, in the order in which they were rendered.

1963—Seventh Circuit

The first case squarely raising the constitutionality of *de facto* segregation to reach a Federal Court of Appeals was *Bell v. School City of Gary, Indiana*, 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964). The percentage of Negroes in the Gary public schools increased sharply between the early fifties and the early sixties, though the 53 percent Negro enrollment with which the trial court was faced in the Gary case came nowhere near the 90 percent figure with which Judge Wright dealt in the case at bar. Though the Gary neighborhood school plan was arrived at for racially neutral reasons and the boundary lines were drawn without any purpose of segregation, racial separation (to the extent of 99 and 100 percent) existed in many of the schools. However, both the trial and appellate courts recognized that the cause of this separation was the residential pattern of Gary and the shifts in population within certain areas of the city. The Seventh Circuit held unequivocally that racial separation in the schools arising in this fashion was not constitutionally prohibited:

We agree with the argument of the defendants stated as "there is no affirmative U. S. Constitutional duty to change innocently arrived at school attendance districts by the mere fact that shifts in population either increase or decrease the percentage of either Negro or white pupils."

* * * *

We approve also of the statement in the District Court's opinion, "Nevertheless, I have seen nothing in the many cases dealing with the segregation problem which leads me to believe that the law requires that a school system developed on the neighborhood school plan, honestly and conscientiously constructed

with no intention or purpose to segregate the races, must be destroyed or abandoned because the resulting effect is to have a racial imbalance in certain schools where the district is populated almost entirely by Negroes or whites. 324 F.2d 213.

1964—Tenth Circuit

Within a year of the Seventh Circuit's decision, the Tenth Circuit came to the same conclusion in a case dealing with the public school system in Kansas City, *Downs v. Board of Education*, 336 F.2d 988 (10th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965). With the exception of a junior college, the public schools of Kansas City were officially segregated before *Brown v. Board of Education*. Following *Brown*, the Kansas City Board of Education, like its counterpart in Washington, D. C., ordered that the schools be desegregated in accordance with the neighborhood school policy. There, as here, the order was implemented rapidly and the neighborhood plan continued in use. Nevertheless, as the Court of Appeals noted, there was "racial imbalance in the public schools of Kansas City" which was related to the city's residential pattern since "the schools located the nearest to the concentration of Negro population had the highest percentage of Negro pupils and the schools the greatest distance away from that concentration were composed entirely of white students." 336 F.2d 996. The court held as follows:

We conclude that the decisions in *Brown* and the many cases following it do not require a school board to destroy or abandon a school system developed on the neighborhood school plan, even though it results in a racial imbalance in the schools, where, as here, that school system has been honestly and conscientiously constructed with no intention or purpose to maintain or perpetuate segregation. 336 F.2d 998.

The Tenth Circuit recently reaffirmed this position in *Board of Education v. Dowell*, 375 F.2d 158, 166 (10th

Cir.) *cert. denied*, 387 U.S. 931 (1967), though it held the school board's action improper on other grounds.

1965—Fourth Circuit

Seven months after *Downs*, the Fourth Circuit dealt with the issue of *de facto* segregation in the public schools of Hopewell, Virginia, an industrial city sharply divided by two railroads, a city in which the great majority of the Negro residents lived on the southeast side of one of these railroad lines. (*Gilliam v. School Board*, 345 F.2d 325 (4th Cir.), *vacated on other grounds*, 382 U.S. 103 (1965).) Though plaintiffs conceded that the school boundaries were drawn along natural barriers, they objected to the resulting large measure of *de facto* segregation. Pointing out that this was due to Hopewell's residential pattern, the court held that such separation was not unconstitutional:

"The Constitution does not require the abandonment of neighborhood schools and the transportation of pupils from one area to another solely for the purpose of mixing the races in the schools." 345 F.2d 328.

1966—Sixth Circuit

The question of *de facto* segregation came before the Sixth Circuit in *Deal v. Cincinnati Board of Education*, 369 F.2d 55 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967). The facts relevant to this issue were summarized by the Court of Appeals' statement that the Negro student population was not spread uniformly among the individual schools because of the operation of the neighborhood school policy in conjunction with the residential concentration of Negroes in some areas. The court held that this fact created no right to relief.

In the course of its opinion, the Court of Appeals considered and rejected arguments of the very same character as those made by Judge Wright in his opinion in the case at bar. Because of the particular importance of the court's reasoning to the present case, we quote at some length from the opinion:

Appellants contend that the maintenance of a public school system in which racial imbalance exists is a violation of their constitutional right to the equal protection of the law. They assert that because the Negro student population is not spread uniformly throughout the Cincinnati school system, without a showing of deliberate discrimination or even racial classification, there is a duty of constitutional dimensions imposed on the school officials to eliminate the imbalance. Appellants claim that it is harmful to Negro children to attend a racially imbalanced school and this fact alone deprives them of equal educational opportunity. 369 F.2d 58.

After discussing the *Brown* decision and stating that "a finding of educational or other harm is not essential to strike down enforced segregation," the court then continued as follows:

Conversely, a showing of harm alone is not enough to invoke the remedial powers of the law. If the state or any of its agencies has not adopted impermissible racial criteria in its treatment of individuals, then there is no violation of the Constitution. If factors outside the schools operate to deprive some children of some of the existing choices, the school board is certainly not responsible therefor.

Appellants, however, argue that the state must take affirmative steps to balance the schools to counteract the variety of private pressures that now operate to restrict the range of choices presented to each school child. Such a theory of constitutional duty would destroy the well-settled principle that the Fourteenth Amendment governs only state action. Under such a theory, all action would be state action, either because the state itself had moved directly or because some private person had acted and thereby created the supposed duty of the state to counteract any consequences.

The standard to be applied is "equal educational opportunity". The Court in *Brown* cast its decision

thus because it recognized that it was both unnecessary and impossible to require that each child come through the complex process of modern education with the same end result. This approach grants due respect for the unavoidable consequences of variations in individual ability, home environment, economic circumstances, and occupational aspirations. Equal opportunity requires that each child start the race without arbitrary official handicaps; it does not require that each shall finish in the same time.

Appellants, however, pose the question of whether the neighborhood system of pupil placement, fairly administered without racial bias, comports with the requirements of equal opportunity if it nevertheless results in the creation of schools with predominantly or even exclusively Negro pupils. The neighborhood system is in wide use throughout the nation and has been for many years the basis of school administration. This is so because it is acknowledged to have several valuable aspects which are an aid to education, such as minimization of safety hazards to children in reaching school, economy of cost in reducing transportation needs, ease of pupil placement and administration through the use of neutral, easily determined standards, and better home-school communication. The Supreme Court in *Brown* recognized geographic districting as the normal method of pupil placement and did not foresee changing it as the result of relief to be granted in that case.

* * *

Because of factors in the private housing market, disparities in job opportunities, and other outside influences (as well as positive free choice by some Negroes), the imposition of the neighborhood concept on existing residential patterns in Cincinnati creates some schools which are predominantly or wholly of one race or another. Appellants insist that this situation, which they concede is not the case in every school in Cincinnati, presents the same separation and hence the same constitutional viola-

tion condemned in *Brown*. We do not accept this contention.

* * * *

In the present case, the only limit on individual choice in education imposed by state action is the use of the neighborhood school plan. Can it be said that this limitation shares the arbitrary, invidious characteristics of a racially restrictive system? We think not.

* * * *

We hold that there is no constitutional duty on the part of the Board to bus Negro or white children out of their neighborhoods or to transfer classes for the sole purpose of alleviating racial imbalance that it did not cause, nor is there a like duty to select new school sites solely in furtherance of such a purpose.

* * * *

In dealing with the multitude of local situations that must be considered and the even greater number of individual students involved, we believe it is the wiser course to allow for the flexibility, imagination and creativity of local school boards in providing for equal opportunity in education for all students. It would be a mistake for the courts to read *Brown* in such a way as to impose one particular concept of educational administration as the only permissible method of insuring equality consistent with sound educational practice. We are of the view that there may be a variety of permissible means to the goal of equal opportunity, and that room for reasonable men of good will to solve these complex community problems must be preserved.
369 F.2d 59-61.

While the question of whether or not there is a constitutional duty to undo *de facto* segregation has not been squarely presented in the First, Second and Third Circuit Courts of Appeals, statements from their decisions show concurrence with the position taken in the Fourth, Sixth, Seventh and Tenth Circuits.

In *Springfield School Comm. v. Barksdale*, 348 F.2d 261 (1st Cir. 1965), the District Court had held that non-white school attendance of appreciably more than 50 percent was "tantamount to segregation," that such "segregation" denied equal educational opportunity, was unconstitutional and that "[T]here must be no segregated schools." The District Court's order (which the Court of Appeals for the First Circuit vacated) was construed as more limited than this sweeping language would suggest. However, focusing on this language, the Court of Appeals conclusively rejected the District Court's holding that racial imbalance was per se unconstitutional:

Certain statements in the opinion, notably that "there must be no segregated schools," suggest an absolute right in the plaintiffs to have what the court found to be "tantamount to segregation" removed at all costs. We can accept no such constitutional right. Cf. *Bell v. School City of Gary*, 7 Cir., 1963. * * * *Downs v. Board of Education*, 10 Cir., 1964; * * *

In *Offerman v. Nitkowski*, 378 F.2d 22 (2d Cir. 1967), the Court of Appeals for the Second Circuit held that a school board which voluntarily chose to consider the race of its pupils in planning school boundaries was not acting unconstitutionally. Before reaching this conclusion, the Second Circuit approved the position taken by the Sixth, Seventh and Tenth Circuits in stating:

"Although there may be some dissent * * * courts generally agree that communities have no constitutional duty to undo bona fide *de facto* segregation." 378 F.2d 24 (citations omitted).

IN 1960, the Court of Appeals for the Third Circuit held, in *Evans v. Ennis*, 281 F.2d 385, *cert. denied*, 364 U.S. 933 (1961), that Delaware's plan for desegregation did not comply with the Supreme Court's requirement of "all deliberate speed." However, Chief Judge Biggs, speaking for the court in his concurring opinion, made it clear that the Board

of Education was not required to junk the neighborhood school plan:

"It was not our intention, nor is it our intention now, to exempt the respective individual infant plaintiffs who may presently actively seek integration from the usual processing of the school system relating to * * * geographical locations, provided always that that processing is conducted on a racially non-discriminatory basis." 281 F.2d 395.

Finally, reference should be made to *United States v. Jefferson County Board of Education*, 372 F.2d 836 (5th Cir. 1966), *aff'd en banc*, 380 F.2d 385 (5th Cir.), *cert. denied*, 389 U.S. 849 (1967). In this case, the Court of Appeals for the Fifth Circuit reversed seven lower court decisions approving desegregation plans in Alabama and Louisiana. The opinion must be read in the context of the situation then existing in the two states. As of December, 1965, only 0.43 percent of the Negro pupils in Alabama and only 0.69 percent of the Negro pupils in Louisiana were attending integrated schools. There had been no bona fide attempt on the part of either state to desegregate the public schools and no integration of teaching staffs in either state.

The *Jefferson County* case has no applicability to the case at bar. There, the court was faced with school systems which had never been desegregated, school systems whose administrators had *never complied* with the Supreme Court's mandate in *Brown v. Board of Education*. By contrast, in the case at bar, this court deals with a school system which was desegregated the same year *Brown* was decided and has, since that time, become racially separated, not because of the Board's action, but because of population shifts within the city and the changing enrollment of the public schools—in short, because of the free choices of this city's individual citizens regarding their place of residence and the education of their children.

From the foregoing review of the leading decisions in all of the United States Courts of Appeals which have had occasion to pass upon the problem, the law appears to be settled: *de facto* segregation, that is, racial imbalance in the schools which results not from governmental action but from residential patterns and population changes, is not a violation of the Federal Constitution.

The trial court's decree to the Board of Education that it bus children at public expense from one neighborhood to another, that it "consider" a host of devices from educational parks to multi-state schooling and that it abolish its own optional zones and substitute those chosen by the court, all for the sole purpose of mixing the races, is contrary not only to the Court of Appeals decisions discussed above but also to the judgment of Congress contained in the Civil Rights Act of 1964, 42 U.S.C. 2000c (b):

" 'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, or natural origin, but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance."

With the exception of *Deal*, the cases which have been discussed above concern racial patterns of housing and population rather than *economic* patterns. However, the legal principle would appear to be the same: Governmental agencies may not classify and separate school pupils on the sole basis of their parents' income any more than they may separate them because of the color of their skin. Conversely, the fact that the accident of birth, our differing capabilities or ambitions and a legion of other individual and social forces have made some of us richer, or poorer, so that we are financially able to live here, and not there, does not produce a violation of the Federal Constitution because our children are assigned to schools in the neighborhood where we live. Few would deny that help from our Government for the sharp economic disparities in our society is needed.

However, the choice of remedies and their effectuation is a matter best left to the executive and legislative branches. The schools cannot reasonably be expected to shoulder the burden of restructuring the economic patterns of our city.

One final word on this general subject. The Board of Education has been fully aware of discrepancies between the physical facilities in its different school plants and the fact that population growth in certain areas has resulted in overcrowding schools in those areas at the expense of others in different sections of the city. The Board has mounted a vigorous building program designed to keep pace with the influx of Negroes in the District and the high concentration of Negro children, and has made every effort to eliminate overcrowding and to bring about substantial uniformity in physical facilities. Some school buildings are necessarily old while others are new. Some school buildings with a high concentration of Negroes have cafeterias while some with a concentration of whites do not. The teachers in some classes may be better or worse than their colleagues in other classes. Such differences, however, are inherent in any school system, as indeed in any human endeavor! If the Fifth and Fourteenth Amendments require "Babbit" uniformity as the price of constitutionality, then all Governmental activity is fatally suspect.

Dr. Hansen and the Board of Education have demonstrated earnest good faith in their efforts to provide substantially equal physical facilities and equal teaching facilities for all pupils in the District of Columbia public schools. In fact, the record shows that they have sought to give "more than equal" treatment by way of compensatory educational programs for children in the disadvantaged areas of the city. We submit that the courts should not now "second guess" these dedicated public officials in their good faith efforts to this end.

II

The Method of Pupil Ability Grouping Used in the District Was Neither Designed nor Administered With Any Purpose of Segregation; the Choice and Effectuation of Such Bona Fide Educational Policies Should Be Left to the Board of Education and the Superintendent of Schools

We submit that one cannot read the trial court's lengthy discussion of the track system of ability grouping and of the scholastic aptitude testing methods which the District's schools have been using without reaching the conclusion that here, if nowhere else, Judge Wright has doffed his judicial robes and has purported to assume the administrative duties of a superintendent of schools. By this statement we do not seek to belittle the trial judge's conscientious study of the problem or to suggest that the District's system of ability grouping and testing of pupils is necessarily the best one. We do submit, however, that these are questions which should be left for debate and determination by professional educators, and that federal judges have no proper role in this field.⁶ The federal appellate courts have repeatedly so held.

In *Brown v. Board of Education*, 347 U.S. 483, 494 (1954), the Supreme Court impliedly approved ability grouping of school children when it said: "To separate them from others of similar age and *qualifications* solely because of their race" is unconstitutional. (Emphasis supplied). No one reasonably questions the legality of grouping according to age.

The Court of Appeals for the Fifth Circuit has been very outspoken on this subject. As early as 1957, in *Borders v. Rippey*, 247 F.2d 268, that court said:

⁶We of course would except from this statement any instance where a school board has deliberately prostituted educational testing or ability grouping for segregatory purposes.

"Pupils may of course, be separated according to their degree of advancement or retardation, their ability to learn, on account of their health, or for any other legitimate reason, but each child is entitled to be treated as an individual without regard to his race or color."

Again, in *Stell v. Savannah-Chatham Board of Education*, 333 F.2d 55, 61-62 (5th Cir. 1964), *cert. denied*, 379 U.S. 933 (1964), the court said:

"... it goes without saying that there is no constitutional prohibition against an assignment of individual students to particular schools on a basis of intelligence, achievement, or other aptitudes upon a uniformly administered program but race must not be a factor in making the assignments. However, this is a question for educators and not the courts."

And when a recalcitrant Georgia District judge sought to interpret this language as permissive mandate for an affirmative order to a board of education requiring it to assign pupils according to intelligence tests, the provoked Fifth Circuit Court of Appeals declared:

"The trial court simply had no power to direct any such plan into effect. Neither, of course, did it have the power to direct that teachers be paid in accordance with their intelligence. These are matters that are strictly left for the administrative body concerned. There is no constitutional authority for federal courts to impose their ideas of school management on boards of education as to these matters." *Stell v. Board of Public Education*, 387 F.2d 486, 491 (5th Cir. 1967)

Other federal courts have spoken to the same effect. In *Jones v. School Board*, 179 F.Supp. 280 (E.D. Va. 1959), Circuit Judge Albert V. Bryan (then a District Judge) was called upon to consider in detail the placement of pupils in Alexandria's public school system through the application of educational standards, including the scores obtained on mental examinations. In his opinion, Judge Bryan said:

"The mental examination given the pupils is customarily a group, not an individual, test. The form of the test is not something for the court; it is an administrative judgment to be made by the school officials. Certainly a test by groups cannot be declared unfair or unacceptable as a matter of law. This is confirmed when, as here, the same kind of test is utilized for all children, irrespective of their race." 179 F.Supp. at 283.

The Court of Appeals for the Fourth Circuit affirmed, with express approval of impartially applied intelligence testing. *Jones v. School Board*, 278 F.2d 72, 75 (4th Cir. 1960).

The Court of Appeals for the Third Circuit made a similar ruling in *Evans v. Ennis*, 281 F.2d 385 (3d Cir. 1960), a case to which we have already referred. The court said:

"It was not our intention, nor is it our intention now, to exempt the respective individual infant plaintiffs who may presently actively seek integration from the usual processing of the school system relating to their capabilities, scholastic attainments and geographical locations, provided always that such processing is done on a racially non-discriminatory basis. 281 F.2d at 395.

See also, *Downs v. Board of Education*, 336 F.2d 988, 995 (10th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965); *Shuttlesworth v. Birmingham Board of Education*, 162 F.Supp. 372 (N.D. Ala.) (three judge court), *aff'd*, 385 U.S. 101 (1958).

Congress itself has recognized the importance of identifying mentally or physically retarded children in the District of Columbia school system and has specifically ordered the Board of Education to give them specialized instruction. Section 31-203 of the District of Columbia Code (1967) provides:

"The Board of Education of the District of Columbia may issue a certificate excusing from attendance at school a child who, upon examination ordered by

such board, is found to be unable mentally or physically to profit from attendance at school; *Provided, however*, That if such examination shows that such child may benefit from specialized instruction adapted to his needs, he shall attend upon such instruction."

General control over public education in the District is vested in the Board of Education. It is authorized by statute to "determine all questions of general policy relating to the schools. . . ." Section 31-101, 103, D.C. Code (1967).

The trial court has cited not a single judicial authority in support of its startling assumption of power over the educational policies vested by law in the Board of Education. The court candidly states that it "does not . . . rest its decision on a finding of intended racial discrimination." It bases its ruling merely on a vague finding that "ability grouping as presently practiced in the District of Columbia school system is a denial of equal opportunity to the poor and a majority of the Negroes in the nation's capital."⁷ (Opinion 443).

In support of this last statement the trial court asserts:

1. That the ratio of Negroes to whites in the "Special Academic" or "Basic" track is greater than their overall ratio

⁷From the following statement (Opinion 515), one cannot help but wonder if the underlying concept motivating the trial judge was not really that public education must produce equality of *result* rather than equality of *opportunity*:

"Moreover, any system of ability grouping which . . . fails in fact to bring the great majority of children into the mainstream of public education denies the children excluded equal educational opportunity and thus encounters the constitutional bar."

By way of comparison, the Court of Appeals for the Sixth Circuit has said:

"Equal opportunity requires that each child start the race without arbitrary official handicaps; it does not require that each shall finish in the same time." *Deal v. Cincinnati Board of Education*, 369 F.2d 55, 60 (6th Cir. 1966), *cert. denied*, 389 U.S. 247 (1967).

in the school population, while the ratio of Negroes to whites in the Honors track is less than their overall school population ratio.

2. That the standardized aptitude tests used as a basis for pupil placement are not properly adapted to children from disadvantaged homes.

3. That there has been undue administrative rigidity in failing to carry out Dr. Hansen's directives—which permitted frequent cross-tracking and frequent testing for changes in ability grouping.

4. That certain overcrowded Negro schools do not have adequate kindergarten facilities and in some instances have no Honors track.

These points will be discussed in order:

1. As has been pointed out previously, only 3.7 percent of all of the children in the public schools are in the Special Academic or Basic track and only 2.9 percent of all pupils are in the Honors track. There are a substantial number of white pupils in the Basic track and a substantial number of Negroes in the Honors track. (See Defendants' Proposed Findings of Fact, F-13, F-14). When one considers the relative average economic status and social background of school children in the two races, the differences in average educational aptitude and achievements are unfortunate, but inevitable. As was pointed out in the statement of facts, at any given family income level Negro children achieve as well as white children (See Defendants' Proposed Findings of Fact, G-15, 17). And as the Sixth Circuit Court of Appeals pointed out in *Deal*, inequalities due to private housing or economic discrimination, however unfortunate they may be, are not inequalities resulting from State action.

2. The trial court's criticism of the aptitude tests used by the District schools might constitute a proper and possibly persuasive argument, if made by a citizen before a Board of Education charged with weighing and determining educational policies. The wisdom and validity of differing

educational testing methods are constantly being debated by educators. But surely, as the Court of Appeals for the Fifth Circuit said in the *Stell* case, 387 F.2d 486, 491: "There is no constitutional authority for federal courts to impose their ideas of school management on boards of education as to these matters."

3. The quotation just cited applies with equal force to the trial court's criticism of the track system's alleged rigidity in actual operation. Whether or not an 8.2 percent upward movement between tracks for junior high school students (Opinion 461) or a 33.8 percent figure for cross-tracking by General track students (Opinion 467) is a sign of flexibility or inflexibility is certainly not a question which a federal judge is *better* qualified to determine than a Board of Education or the chief administrator of a school system. Furthermore, any administrative inadequacies that may have existed in the carrying out of Dr. Hansen's directives for cross-tracking and periodic testing are obviously matters which should be left for consideration and correction by school administrators, not taken as a constitutional mandate for a sweeping order. The fact that a patient may have some stiffness in his fingers does not warrant amputation of his hand.

4. There are certain schools (both Negro and white) which, for lack of demand, did not offer an Honors program during the 1965-66 school year. It is also true that certain all-Negro or predominantly Negro schools do not have adequate space for the District's voluntary kindergarten program. Approximately 100 children who wished to attend kindergarten were unable to do so in 1965-66, and approximately 345 had to remain on a waiting list (Exhibit A-3-10 p. 10). Children who were equipped for the Honors program but who attended schools where there was no such program have been permitted to go to other schools with transportation at their own expense.

Appellants concede that the Board of Education is under a legal duty, when it offers kindergarten and Honors pro-

grams, to make such programs available to *all children* who because of tender years or exceptional intellectual ability are qualified to attend one of these programs. It might well be proper for the court to require the Board to live up to its full responsibilities in this regard and, if necessary, to provide transportation at public expense to children who are required to go out of their neighborhood in order to obtain temporary facilities for kindergarten or Honors programs.

However, with the single exception which we have noted, it is apparent that the trial court's opinion and decree relating to ability grouping and aptitude testing methods go far beyond the proper role of a federal court. The selection and operation of various educational methods are matters best left in the hands of those who understand them best, educators and school administrators, working within the framework of criticism and ultimate control traditionally provided by the community and its legislative body.

In the wake of Judge Wright's decree, the wreckage of pupil ability grouping stands out as an ironic and tragic casualty. His condemnation of the method of grouping conscientiously selected by the Board of Education has the unavoidable consequence of shading all pupil ability grouping with illegality. Yet such grouping is desperately needed if the District's schools are to provide the differentiated instruction which the experts who compiled and wrote the Passow Report so strenuously recommended as the key to improving the District's schools:

"Differentiated instruction based on differentiated needs is at the heart of both *equality* and *quality*. This is where the schools must focus their efforts, while concurrently other agencies and institutions are bringing about social and physical renewal to the District of Columbia." (Passow Report 4) (emphasis in the report).

III

The Defendants' Efforts To Integrate School Faculties Meet Constitutional Requirements; Compulsory Reassignment Should Not Be Ordered When No Teacher Is a Party to the Action

Appellants have no quarrel with the trial court's conclusion that the Board of Education has an affirmative duty to take appropriate steps for the desegregation of the faculties and administrative personnel of the District's public schools. See *Bradley v. School Board*, 382 U.S. 103; *Rogers v. Paul*, 382 U.S. 198. It is submitted, however, that the Board is earnestly endeavoring to do this very thing and that the court's mandatory injunction, imposing an arbitrary requirement to integrate the faculties of every single school at once, was unwarranted.

The trial court absolved the school administration of "discriminatorily refusing to hire Negro teachers or to appoint Negroes to school principalships." (Opinion 422). As heretofore stated, Dr. Hansen, on April 30, 1964, issued a directive to school personnel to make a maximum effort to establish bi-racial faculties in the remaining schools in the District of Columbia where they did not exist. Faculty integration is proceeding apace and in 1966-1967 there were both Negro and white teachers in every junior and senior high school. It is only in certain elementary schools that all Negro faculties still exist, and the number of these is being reduced from year to year.

The absence of fully integrated faculties in all the District's schools at the time of trial is explained by factors other than intentional segregation. One of these factors is that of differing enrollment rates in predominantly white and Negro schools. Schools with static or declining enrollments create no teaching vacancies. The District's schools with predominantly white pupil enrollments have a declining enrollment, whereas the predominantly Negro schools have an increasing enrollment that creates teaching vacancies. (Plts. P-4, P-5, P-6). Another factor is the necessity

of creating faculties in the various schools that function effectively in the schools' main role—education. The training and preparation of a teacher is of more educational significance than his race (Tr. 5074-75), and while bi-racial staffing of faculties is an important consideration, it is properly subordinated to considerations of merit and ability. Other important goals are the need for a balanced instructional program, for the male image and for control in a classroom. (Tr. 2701-02). Furthermore, stable faculties are educationally advantageous in promoting faculty cooperation and continuity of leadership. (Tr. 5092). It takes at least five years to build a cohesive teacher staff within a school. (Tr. 3022).

The compulsory transfer of teachers is a remedy fraught with danger to the school system. Dr. Hansen has been opposed to such compulsion because of resentment that would be engendered among teachers by such an approach. (Tr. 77). Until the trial court's decree, there had been no such compulsory reassignment (Tr. 2989). In the face of the critical problem of obtaining sufficient qualified teachers (Tr. 5079), compulsion under pain of dismissal is shortsighted because of the likelihood that the teacher will move to another school system (Tr. 5077-78).

Finally, counsel submit that the trial court was without legal authority to order the mandatory reassignment of teaching personnel in the absence of teachers as parties to the proceedings. It will be recalled that Carolyn Stewart, the only teacher who had originally been a party to this case, withdrew from all participation therein before the trial began (Opinion 501, note 175). In the absence of any teacher as a party, the court should not have required the involuntary assignment or reassignment of teachers, *Wheeler v. Durham City Board of Education*, 363 F.2d 738, 741 (4th Cir. 1966).

Perhaps the strongest confirmation of the school administration's good sense in refusing to embark on the type of wholesale reassignment now ordered by the trial court comes from the up-to-date Passow Report. Though urging that the

District be more color-conscious in the "assignment of personnel to vacancies," it recommended that it strive for biracial staffs through recruitment and staffing, "*rather than through mass reassignment of the few white teachers left in the District system.*" (Passow Report 7) (emphasis in the Report).

CONCLUSION

This case is of far reaching importance to the public school systems of the United States. The fundamental issue, starkly posed, is whether or not Federal courts are to assume continuing administrative direction of the educational policies of the nation's public schools. This Judge Wright has sought to do, for in his opinion and decree he not only determines what is and is not good educational policy but has required the Board of Education to make periodic reports to him on its progress in carrying out his various mandates. If this be held proper judicial action, the Board's statutory discretion in fundamental educational policies will be at an end, for the court's decree has in effect negated the specific direction of the Congress of the United States "that the control of the public schools of the District of Columbia is * * * vested in the Board of Education." (§ 31-101, D.C. Code 1967 Ed.)

The Congress has just enacted new legislation to permit the people of the District of Columbia to elect their Board of Education. Such newly elected Board will soon take office. Its members should not be required to function in a judicial straitjacket.

The judgment of the trial court should be reversed and
the complaint dismissed.

Respectfully submitted,

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APPENDIX A
Statutes Involved

Constitution of the United States, Fifth Amendment:

"No person shall be . . . deprived of life, liberty, or property, without due process of law."

Constitution of the United States, Fourteenth Amendment:

"No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

District of Columbia Code, § 31-101 (1967):

"(a) The control of the public schools of the District of Columbia is hereby vested in a Board of Education to consist of nine members all of whom shall have been for five years immediately preceding their appointment bona fide residents of the District of Columbia and three of whom shall be women. The members of the Board of Education shall be appointed by the United States District Court judges of the District of Columbia for terms of three years each, and members shall be eligible for reappointment. * * *"

District of Columbia Code, § 31-103 (1967):

"The board shall determine all questions of general policy relating to the schools, shall appoint the executive officers hereinafter provided for, define their duties, and direct expenditures. All expenditures of public funds for such school purposes shall be made and accounted for as now provided by law under the direction and control of the Commissioners of the District of Columbia. The board shall appoint all teachers in the manner hereinafter prescribed and all other employees provided for in this chapter."

District of Columbia Code, § 31-203 (1967):

"The Board of Education of the District of Columbia may issue a certificate excusing from attendance at school a child who, upon examination ordered by such board, is found to be unable mentally or physi-

cally to profit from attendance at school: *Provided, however,* That if such examination shows that such child may benefit from specialized instruction adapted to his needs, he shall attend upon such instruction."

Civil Rights Act of 1964, 42 U.S.C. § 2000c(b), 78 Stat. 247 (1964):

"(b) 'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance."

Title 28, U.S. Code, Section 2282:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."



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BRIEF FOR APPELLEES

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 21,167

CARL C. SMUCK, A Member of the Board of Education
of the District of Columbia,

Appellant,

v.

JULIUS W. HOBSON, et al.,

Appellees.

NO. 21,168

CARL F. HANSEN, Superintendent of Schools of the
District of Columbia,

Appellant,

v.

JULIUS W. HOBSON, et al.,

Appellees.

Appeals from the United States District Court for
the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED JUN 11 1968

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

In the opinion of the appellees, the following questions are presented:

I. Preliminary Issues

A. Whether the parent-appellants and appellant Hansen in his individual capacity have standing to intervene?

B. Whether appellants Smuck and Hansen in their official capacities have standing to appeal?

C. Whether the separation of the first cause of action was proper?

D. Whether the refusal of the trial judge to recuse himself was error?

II. The Merits

A. Whether the neighborhood school policy of the District of Columbia violated the Constitution of the United States?

B. Whether the District of Columbia track system unconstitutionally deprived appellees and their classes of equal educational opportunities?

C. Whether the compulsory reassignment of teachers to integrate public school faculties in the District of Columbia is proper?

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 21,167

CARL C. SMUCK, A Member of the Board of Education
of the District of Columbia,

Appellant,

v.

JULIUS W. HOBSON, individually and on behalf of
JEAN MARIE HOBSON and JULIUS W. HOBSON, JR.;
SAMUEL D. GRAHAM, individually and on behalf of
BARBARA JEANE GRAHAM and KAREN CHANDELLE GRAHAM;
MARY ALICE BROWN, individually and on behalf of
CHARLES HUDSON BROWN; PAULINE SMITH, individually
and on behalf of MAURICE HOOD; WILLIE DAVIS, JR.,
individually and on behalf of RONALD D. DAVIS,
REGINALD D. DAVIS and MYOSHI J. DAVIS; JAMES K.
WARD, individually and on behalf of CHRYCYNTHIA
ELAIN WARD; JOYCE M. MAKEL, individually and on
behalf of MICHELLE I. MAKEL; and CAROLYN HILL
STEWART,

Appellees.

NO. 21,168

CARL F. HANSEN, Superintendent of Schools of the
District of Columbia,

Appellant,

v.

JULIUS W. HOBSON, individually and on behalf of
JEAN MARIE HOBSON and JULIUS W. HOBSON, JR.;
SAMUEL D. GRAHAM, individually and on behalf of
BARBARA JEANE GRAHAM and KAREN CHANDELLE GRAHAM;
MARY ALICE BROWN, individually and on behalf of
CHARLES HUDSON BROWN; PAULINE SMITH, individually
and on behalf of MAURICE HOOD; WILLIE DAVIS, JR.,
individually and on behalf of RONALD D. DAVIS,
REGINALD D. DAVIS and MYOSHI J. DAVIS; JAMES K.
WARD, individually and on behalf of CHRYCYNTHIA
ELAIN WARD; JOYCE M. MAKEL, individually and on
behalf of MICHELLE I. MAKEL; and CAROLYN HILL
STEWART,

Appellees.

PRELIMINARY STATEMENT

In their brief, appellants have confined themselves to three preliminary issues and to a like number on the merits. These issues, as styled by appellants, are as follows:

1. Preliminary Issues

- a. Appellants have standing to intervene purpose of appealing the judgment below.
- b. The judgment below should be reversed because the Chief Judge of this Court separated the first cause of action when convening a three-judge district court pursuant to 28 U.S.C. 2282 and 2284 and because the trial judge proceeded to try the merits of the remaining five causes of action.
- c. The trial judge should have disqualified himself.

2. Issues on the Merits

- a. The neighborhood school plan of the District of Columbia does not violate the Constitution of the United States.
- b. The trial court acted improperly in ordering the elimination of the former ability grouping program of the District

of Columbia, known as the "Track System".

- c. The trial court acted improperly in ordering the reassignment of teacher personnel in the District of Columbia in order to achieve faculty integration.

In responding to appellants' brief, appellees will limit themselves, insofar as possible, to the precise issues raised therein.

COUNTERSTATEMENT OF THE CASE

This class action was instituted on or about January 13, 1966, by the filing of a verified complaint for injunctive and declaratory relief in the court below.¹ The plaintiffs² were eleven black children entitled to public education in the District of Columbia, their parents and/or guardians, and a teacher in the public school system of the District of Columbia.³ The defendants were the Judges

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1. The injunctive and declaratory relief sought by appellees is set forth on pp. 12-14 of the complaint.
 2. Appellees in this Court.
 3. This teacher, Carolyn Hill Stewart, signed a written retainer of William M. Kunstler on January 8, 1966. On the opening day of the trial, a letter from her, and three other plaintiffs, which purported, in effect, to discharge said attorney, was filed in the record (T. 5). However, Mrs. Stewart did not withdraw from the action but remained "nominally a party". 269 F.Supp. at 501, fn. 175.

of the United States District Court for the District of Columbia (First Cause of Action only), the Board of Education of the District of Columbia and the members thereof, the Superintendent of Schools of the District of Columbia, and the members of the Board of Elections of the District of Columbia (Prayer for Relief only). All defendants were sued in their individual capacities only.

In brief the complaint alleged as follows:

1. First Cause of Action

§31-101 of the District of Columbia Code, which directed and empowered the District Judges to appoint the members of the school board, violated Article II, §2, Cl. 2 of the Constitution of the United States (Complaint 7).

2. Second Cause of Action

The defendants⁴ have operated the school system so as to discriminate against black children in violation of the Fifth Amendment to the Constitution of the United States, by, inter alia:

a. The institution and maintenance of the
Track System;

4. The defendants in Causes of Action 2-6 inclusive do not include the District Judges or the members of the Board of Elections. On April 18, 1966, a motion by the District Judges to dismiss the complaint as to the Second, Third, Fourth, Fifth and Sixth Causes of Action was granted by the court below.

b. The pursuance of racially discriminatory educational policies;

c. The providing of inferior plant, equipment, materials, supplies and curricula to schools with predominantly black pupil populations;

d. The utilization of public revenues to match or equal private funds raised for the improvement of public schools with predominantly white pupil populations;

e. The acceptance of private funds for the improvement of public schools with predominantly white pupil populations;

f. The conspicuous stationing of law enforcement officials in public schools with predominantly black pupil populations;

g. The dismissal or refusal to appoint qualified black applicants to high administrative and supervisory positions in the school system;

h. The failure to promote qualified black teachers;

i. The failure to utilize available federal funds for the benefit of impoverished black pupils and, instead, the distribution thereof in favor of public schools with predominantly white pupil populations;

j. The allocation and assignment of less experienced teachers to public schools with predominantly black pupil populations;

k. The drawing of geographical lines in the District of Columbia so as to segregate the black pupils thereof; and

l. The violation of the mandate of the Supreme Court of the United States in Bolling v. Sharpe, 347 U.S. 497.

(Complaint 7-10)

3. Third Cause of Action

The defendants have failed to demand adequate funds for the operation of the school system from the appropriate governmental agencies and bodies, thereby purposely and wilfully creating racial discrimination and segregation in the said system, all in violation of the Fifth Amendment to the Constitution of the United States.
(Complaint 10-11)

4. Fourth, Fifth and Sixth Causes of Action

The defendants have discriminated in like fashion as set forth in the first three causes of action against economically deprived pupils in the school system.
(Complaint 11)

In their complaint, plaintiffs requested the convening of a three-judge district court pursuant to the provisions of 28 U.S.C. 2282, 2284 (Complaint 12). Plaintiffs and defendants having moved for summary judgment (February 11, 1966) and to dismiss (February 21, 1966) respectively on the first cause of action, Circuit Judge Wright,⁵ on March 25, 1966, certified the necessity of convening a three-judge court insofar as said cause of action was concerned to the Chief Judge of this Court⁶ and referred both motions to said court when convened. On March 29, 1966, a three-judge court was duly convened by order of the Chief Judge⁷ "to hear and determine the first cause of action outlined in the complaint." The remaining causes of action were "remanded to Honorable J. Skelly Wright for further action. . . ."⁸

Defendants thereupon moved the Chief Judge to expand his order of March 29, 1966, to include the remaining causes of action. On June 1, 1966, the Chief Judge

5. Sitting by designation pursuant to 28 U.S.C. §291(c).

6. 252 F. Supp. 4, 7.

7. Circuit Judges Fahy, Wright and Miller.

8. See 256 F. Supp. 18, 19.

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denied said motion⁹ on the grounds that Count One was "in no way related to counts two through six, except for the identity of certain defendants" and that "there is no identity between the factual issues underlying count one and those of the rest of the complaint." Moreover, he concluded that "to allow the joinder of claims unrelated to the legislation under attack would severely undermine the sharply limited purpose for three-judge courts, at heavy costs to judicial administration both in the lower federal courts and in the Supreme Court."¹⁰

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On February 9, 1967,¹¹ the majority of the district court entered an opinion and order denying appellants' motion for summary judgment and granting that of appellees to dismiss Count 1 of the complaint. After finding that all but two of appellants had sufficient standing to question the validity of Section 31-101, the majority held that, under Article I, Section 8, clause 17 and Article II, Section 2, clause 2 of the Constitution of the United States, Congress

9. Similar motions addressed to the three-judge court to assume jurisdiction over the entire case and to Judge Wright to refrain from exercising jurisdiction of the second to the sixth causes of action while sitting as a single-judge court were denied on May 31 and June 1, 1966, respectively.

10. 256 F. Supp. at 20-21.

11. This opinion-order, which appears at 265 F. Supp. 902, is incorrectly referred to in appellants' brief as having been entered on February 19, 1967.

was empowered to enact the statute in question.^{11a}

Circuit Judge Wright, dissenting, would have found that Article II, Section 2, clause 2 was inapplicable to the appointment of members of the District of Columbia Board of Education because they "are not 'officers of the United States' within the sense of that Article." Nevertheless, Judge Wright maintained, Article II "permits Congress to require a federal court to appoint only personnel meaningfully affiliated with the judiciary. Therefore, it affords no basis for §101."

Likewise, Judge Wright would have held that Article I, Section 8, clause 17 did not justify Section 101. In his view, reliance on Article I to support the duties imposed by Section 101 on the District Court "would seriously damage the integrity of this court derived from Article III." He would have concluded that the District Courts had "full, unadulterated Article III status and independence equal to federal courts throughout the country. . ."

A notice of appeal was duly filed with the Clerk of the Court below on March 1, 1967. A jurisdictional statement was filed with the Clerk of the Supreme Court on or about May 30, 1967, after an extension of time in which to do so was granted by Circuit Judge Wright pursuant to Rule 13 of the Revised Rules of the Supreme Court. On June 3, 1968, counsel for appellees agreed with the Solicitor

^{11a}. 265 F. Supp. 902.

General of the United States to enter into a stipulation pursuant to Rule 60 of the Rules of the Supreme Court to¹² discontinue the appeal as academic.

The trial¹³ of Causes of Action Two through Six began before Circuit Judge Wright on July 18, 1966, and continued intermittantly through October 25, 1967, consuming twenty-six trial days. In all 18 witnesses testified for plaintiffs and 12 for defendants, their testimony filling a cumulative total of 6,737¹⁴ pages of trial transcript. In addition, plaintiffs introduced 274 exhibits and defendants 183.

Following the submission of findings of fact, conclusions of law and memoranda by the parties, Judge Wright, on June 19, 1967, filed his opinion, containing¹⁵ his Findings of Fact, Conclusions of Law and Decree. In the latter, Judge Wright permanently enjoined the defend-

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12. The academic nature of the appeal was caused by the enactment of legislation providing for the election in the future of the members of the school board.
 13. On May 24, 1966, plaintiffs moved for a restraining order and other injunctive relief to restrain defendant Board from proceeding with a planned study of the District School System. After an evidentiary hearing on June 20-21, 1966, the court below, on June 29, 1966, denied said motion.
 14. By gross number.
 15. These may be found at 269 F. Supp. 401-519.

ants "from discriminating on the basis of racial or economic status. . . ." and "from operating the track system. . . ." in the District of Columbia public schools. In addition, defendants were directed, inter alia, (1) to file a satisfactory plan of pupil assignment on or before October 2, 1967,¹⁶ (2) to "provide transportation for volunteering children in overcrowded school districts east of Rock Creek Park to underpopulated schools west of the Park,"¹⁷ (3) to abolish certain optional zones,¹⁸ and (4) to "provide substantial teacher integration in the faculty of each school."¹⁸ The Court expressly retained jurisdiction for the purpose of the implementation of the decree.¹⁹

On October 3, 1966, the fourteenth day of the trial, defendants moved "for voluntary displacement" of Judge Wright on the ground that (1) he had delivered the sixth annual James Madison Lecture at the New York University School of Law on February 17, 1965, which was concerned with

16. On August 31, 1967, on motion of defendants and without opposition by plaintiffs, all compliance reports due on October 2, 1967, were extended to January 2, 1968.

17. After first denying on August 31, 1967, defendants' motion to postpone temporarily the abolition of certain of these optional zones, the court below, after an evidentiary hearing, reversed its decision on September 7, 1967.

18. 269 F. Supp. at 517.

19. 269 F. Supp. at 516-17.

public school desegregation and legal remedies for de facto segregation,²⁰ and (2) on September 14, 1966, he had made some allegedly prejudicial remarks relating to defendants' prospective motion for judgment.²¹ The trial court denied the motion from the bench (T. 2285-87).

On July 1, 1967, the Board of Education, at a special meeting thereof, voted 6-2 not to appeal the opinion and decree of the court below.²² At the same time it directed appellant Hansen, by a vote of 7-2, "not to take any action inconsistent with" the Board's said decision not to appeal.²³ On July 3, 1967, Dr. Hansen announced his retirement effective July 31, 1967, and, five days later, the Board of Education unanimously accepted said retirement. On July 17, 1967, Dr. Hansen, as Superintendent, and School Board member Carl C. Smuck, who had dissented in both votes taken on July 1st, filed notices of appeal to this Court from the opinion-decree of June 19, 1967. At the same time, Dr. Hansen, in his individual capacity, filed a motion

20. 40 N.Y.U.L.Rev. 285-309 (April, 1965)

21. T. 2203-04.

22. Three newly appointed members of the Board of Education took office on July 1, 1967, thereby giving Negroes a majority thereon for the first time since its formation in 1906.

23. In their brief at P. 3, appellants indicate that the direction to Dr. Hansen was "on pain of discharge." This proviso does not appear in the transcript of the special meeting of the Board of Education.

under Rule 24, F.R.Civ.Pro., for leave to intervene as a matter of right as a party for purposes of taking an appeal from the said opinion-decree. On July 19, 1967, twenty parents (representing twelve families) of public school children and one public school teacher²⁴ filed similar motions with the court below. Coupled with these motions²⁵ to intervene were notices of appeal. Upon appellees' objection, argument was had before Judge Wright on July 28, 1967.

On July 27, 1967, appellees moved in this Court to dismiss all of the above purported notices of appeal. On August 1, 1967, Dr. Hansen, as Superintendent, moved to consolidate both appeals.²⁶ At the same time, an opposition to appellees' motions to dismiss together with motions to remand the within appeals to the district court for rulings on the aforesaid motions to intervene, or, in the alternative, for action by this court therein, were made by appellees. Subsequently, appellants also moved in this Court "to vacate the Judgment and Order of the District Judge of June 19, 1967, herein, and to remand the case to the District Court

24. This individual subsequently withdrew from the litigation.

25. Comparable motions to intervene were filed directly with this Court.

26. This motion was granted sua sponte by the Chief Judge on November 8, 1967.

for retrial." Appellees filed their opposition to said motion on August 11, 1967.

On December 18, 1967, this Court, after hearing argument en banc on November 14, 1967, on appellees' motions to dismiss, ordered that the appeals of appellants Hansen and Smuck be held in abeyance, and remanded the motions to intervene of the other prospective appellants to the District Court for hearing and decision. On February 19, 1968, following an evidentiary hearing on January 23, 1968, the court below, after finding that the moving parties had failed "to demonstrate and specify a substantial interest which they can only protect through intervention", granted said motions "in order to give the Court of Appeals an opportunity to pass on the intervention questions raised here, and the questions to be raised by the appeal on the merits if it finds the intervention was properly allowed. . . ."²⁷ On March 27, 1968, appellees renewed their motion of July 27, 1967, in this Court to dismiss all of the above purported notices of appeal, and requested "that said motion be considered prior to the establishment of a briefing schedule herein."²⁸

27. At the same time, the district court denied a motion by appellants for a stay of its opinion-decree of June 19, 1967, pending appeal.

28. This request was apparently denied by the Court and an order establishing a briefing schedule was thereupon duly entered.

COUNTERSTATEMENT OF THE FACTS

Prior to the school year 1954-55, the District of Columbia public school system (hereinafter referred to as the "school system") was divided along strictly racial lines into two divisions, viz: Division One -- white pupils; Division Two -- black pupils (T.41). Following the decision of the United States Supreme Court in Bolling v. Sharpe, 347 U.S. 497 (1954), the two divisions were ended and a single school system containing both white and black students created (T.43-44).

District children between the ages of 7-16 who are not attending private or parochial schools, must, by law, be enrolled in the school system (T.515), which was, at the time of trial, composed of the following academic divisions:

- a) 130 Elementary schools -- kindergarten through sixth grade inclusive
- b) 25 Junior high schools -- seventh through ninth grades inclusive
- c) 11 Senior high schools -- tenth through twelfth grades inclusive

In addition, there were five vocational high schools (T.130) and a variety of special schools, such as those for unwed mothers (T.2629) and "outwardly acting boys" (T.2630).

Since 1906, the school system has been under the control of a Board of Education whose nine members were

nominated and appointed by the United States District Judges of the District of Columbia pursuant to § 31-101 of the District of Columbia Code (A-3, p. 6). The only qualifications for membership on the Board were five years' residence in the district and that three of its members must be women (A-3, p. 6). It was not -- and never has been -- a representative body and neither sought nor encouraged community views on any aspect of its plans or program (A-3, pp. 6-8).²⁹

Theoretically at least, the Board established all policies for the school system (A-3, p. 6). As a practical matter, however, the system has always been dominated by its always white Superintendent of Schools, who not only served as its administrative head (T.974) but formulated fundamental policy as well (T.976-77, A-3, pp. 7-8). Appellant Hansen was appointed by the Board of Education in 1958 (T.37-40, 2278-79). In 1955, as Assistant Superintendent of Schools for the Senior High Schools, he developed a curriculum classification program known colloquially as "the track system" (T.226, 376-7, A-3, p. 33, B-11).

Pertinent testimonial and documentary evidence at the trial clearly revealed the following:

29. Congress recently passed and the President has just signed an amendment to §31-101, D.C. Code, providing for an elected school board. U.S. Code and Adm. News., No. 2, April 5, 1968, at 579.

A. Pupil Segregation

There was no room to question the almost total segregation of black children in and by the school system. Even taking into consideration a steadily declining white pupil enrollment, it was obvious that nought but lip-serving attempts had been made since 1954 to integrate pupil populations. Although the twenty-three predominantly white elementary schools in 1961-62 (V-3, M-1 to 5) had decreased to fourteen in 1965-66 because of the flight of white children to the suburbs or their transfer to parochial or private schools (T. 732-3, V-3, M- 1 to 5 and P-4 to 8), no realistic efforts were made by appropriate officials to integrate any segregated schools.

In fact, they have done everything in their power to avoid such a result. Not only did they fill empty classrooms in the predominantly white elementary schools with non-assimilable, severely mentally retarded children in order to avoid even a basic attempt at integration (T. 2255-56), but they devised and implemented such schemes as "optional pupil transfer zones" to permit white students to escape attending predominantly black schools after the decision in Bolling v. Sharpe, supra, (T. 2980-2981). The track system itself originated from a determination to maintain segregation by outwardly defensible methods which separated races as neatly as the legislation struck down in Bolling.

Lastly, under the umbrella of a rigid neighborhood school policy, no reasonable plans or programs were explored or undertaken to change the hardening racial complexion of the District's schools.

The record is so replete with examples of these and other deliberate separative tactics and devices that it would serve no useful purpose to delineate them all.³⁰ Although appellees, under their view of the applicable law, do not feel that affirmance hinges on a finding of "state action", they do insist that school officials are guilty of wilfulness in this and other areas. To deny this would be to ignore the latter's own admissions and concessions as well as the natural inferences raised by their actions.

Because of a rigid neighborhood school concept, elementary, junior and senior high school pupils must attend schools near their homes (T. 131, N 7-a). With rare exceptions, the present boundaries, established in 1956, have remained virtually unchanged since that time (T. 3728-29). In constructing new schools, little, if any, effort has been made to give even token priority to the ideal of integration over the neighborhood school concept (T. 3725-6).

30. E.g. see the testimony of Assistant Superintendent John Koontz with reference to the "optimal pupil transfer zones", T. 2845-6, 2955-6 and 2977, and that of Dr. Hansen on the same subject at T. 153, 165-6.

As a result, at the time of trial only eighteen elementary schools, three junior high schools and three senior high schools contained less than 85% of one race (A-3, p. 20).

Appellee Hansen frankly admitted during trial that he did not favor any ameliorative plans or programs to integrate the District's schools. Among other things, he opposed busing, except to relieve overcrowding (T. 183), had never asked the Board to consider educational parks (T. 177),³¹ team teaching (T. 975) or the adoption of the Princeton Plan (T-199), had never recommended building new schools in areas where an integrated pupil population was possible (T. 552-53) and had insisted on the maintenance of a highly discriminatory curriculum classification program (T. 977-78). Despite his pious acceptance of the reality of Bolling, he has restricted its applicability to the narrowest of limits.³²

B. The Track System

The track system, which originated immediately following the Bolling decision, was, according to Dr. Hansen, merely an ability grouping program on a curriculum rather

31. Dr. Hansen, after admitting that the school system had "not engaged in a research study of the educational park" (T. 177), labelled it "a monstrosity" (T. 178).

32. Admittedly, he easily yielded to the pressures of white parents who, he says, were "constantly complaining" (T. 164) until buffeted by countervailing black ones (T. 169-171).

than a class basis. But as he finally -- and reluctantly -- admitted to the trial court, its institution was directly related to the 1954 court-ordered integration of the school system.

THE COURT: I think the question, Dr. Hansen, is this, whether or not the track system was started as a result of desegregation ordered by the Supreme Court of the United States. Now, that is a simple question.

THE WITNESS: Your Honor, I am trying to give you a compound answer --

THE COURT: Well, was it or not?

THE WITNESS: I am going to give you an unsimple answer because I have to go into my own background, you understand, so you can understand --

THE COURT: Can't you answer "yes" or "no" and then go into your own background?

THE WITNESS: I cannot that, sir.

THE COURT: Well, it was not started as a result of desegregation?

THE WITNESS: It was a combination of factors.

THE COURT: Well, this was one of the factors?

THE WITNESS: It was one of the factors.

(p. 236)

It is painfully apparent that the track system was designed to and did restore the Division One-Division Two dichotomy. If the upper curricula contained most of the white pupils and the lower ones most of the black pupils, their segregation was reestablished with the same subtlety

as was southern black disfranchisement by voter qualification tests.³³ By the 1959-60 school year, when the system had been extended throughout the public schools, whites were as effectively insulated from blacks as they had been in the pre-Bolling days.

Not only did the track system serve as an efficient racial separator, but it effectively prevented blacks and low-income children from achieving their educational potential. The contrast between predominantly black Dunbar Senior High School, where there was a special academic but no honors track and 82%-85% of its students were in the lower two tracks during the 1963-64 school year, and predominantly white Wilson Senior High School, where, for the same period, there was an honors track but no special academic track and 92% of its students were in the top two tracks, speaks for itself (T. 720-21, V-2, A-3). Almost without exception, the lower the percentage of black students in a particular school, the fewer the number of students in the lower tracks (T. 1154, 1201, B-16,17, T-2).

The evidence pointedly showed that once a child was placed in the lower tracks, he was virtually frozen there for his entire school career (B-1). Not only were

33. See C. Van Woodward, Origins of the New South, Louisiana State University Press, 1951, pp. 321-349.

significant numbers of such children not tested for years after their initial placement (A-13),³⁴ but inter-track movement was almost nil (T.329,357, 1192-1194, A-3, p. 52). Moreover, the frequent presence in the special academic track of emotionally disturbed pupils, severely mentally retarded children and disciplinary problems militated against improvement. This track became, for all practical purposes a "dumping ground" for those children wholly abandoned by the school system.³⁵

The basic evil of the track system, from a racial point of view, is that the results of standardized group aptitude and achievement tests, virtually all of which are verbal tests (T.3233-34), played such a determinative role in the placement of pupils.³⁶ Despite the fact, conceded by

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34. In September of 1965, after severe public criticism, the school system instituted a "crash program" to re-evaluate 1273 children who had been assigned to or were being considered for placement in the special academic track. After such program had been completed, 832 were transferred into other curricula (T.390-96, 1928, 6051, A-3, p. 36).
 35. Despite the existence of considerable opposition to the track system from other school systems and such well-known experts as Dr. Kenneth Clark, Dr. Dan Dodson, Dr. Harold Shayne and Dr. Ronald Doll, Dr. Hansen never so informed the School Board prior to December, 1965 (T. 975, 1204-05).
 36. Unfortunately, these placement tests are, on the average, administered at three and four-year intervals (T. 238, 305, 334, 351-2).

all of the experts in such testing called by both plaintiffs and defendants below, that the group tests used by the school system were standardized on a middle-class white population (T. 1108, 1233-34, 1357, B-10, the District's black and low-income pupils were gauged by these invalid national norms (T. 1018-19). Because they did poorer on these tests than pupils who more nearly approximate the standardization group, they were uniformly relegated to the lower tracks (T. 1237, B-4, 5, P-20). Since these tracks militated against eventual college attendance, these black and low-income pupils were, virtually from the beginning of their school careers, foreclosed from the achievement of higher educational goals (T. 1842).

The basic inequality of using these standardized group tests as determinative factors in placing pupils in tracks was dramatically illustrated by the results of non-verbal aptitude tests taken by black inmates of the Lorton Youth Center (G-3,10). The average I.Q. obtained on these tests was considerably higher than that achieved by the same students on verbal tests administered by the school system (T. 1491-92, 1595, 3561, A-3, p. 43, L-10). Accordingly, these students would have been placed, if these tests had been used by the school system, in higher tracks than those to which they were relegated by the school system (T. 6046) and many would have been eligible for admission to vocational

schools which require a 90 or better I.Q. (T.33, 651, 929-30, C-14).³⁷

Moreover, the pupil segregation created by rigid adherence to the neighborhood school concept and other devices utilized by the school system, augment the inability of black and low-income pupils to do well on group or individual tests or, indeed, in their prescribed courses. As plaintiffs' experts uniformly testified, black children in predominantly black schools did not do as well academically as black children in racially integrated institutions (A-24).³⁸ This partially explains the disproportionately high numbers of black dropouts (T. 523, 737, A-3, C-1,2, V-5) and the lower percentage of college-bound black students (T. 1842) as well as their poorer showing on standardized group tests (T. 3407, 3409).³⁹

Finally, it is beyond cavil that the defendants reacted to the growing black pupil population by writing off

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- 37. The progress made by these inmates in the school maintained at the Lorton Youth Center revealed the tragic fact that these black children received a better education in prison than they did in the school system (T. 1500-01, C-10).
 - 38. Since there are no studies available, it is impossible to tell whether this difference in achievement is due to the fact that racially integrated schools are better schools insofar as plant, teachers and curricula are concerned rather than the mere fact of integration itself.
 - 39. This pattern was clearly illustrated by the high failure rate of District blacks on the Armed Forces Qualification Test (T.6647, A-34a, A-38).

the school system.⁴⁰ As the percentage of blacks increased, the quality of education was allowed to decrease steadily. A comparison between the school system and its adjoining suburban equivalents clearly revealed the horrifying nature of the former's declining educational status (R-9 to 68).

C. Teacher segregation

Black teachers were rigidly segregated in the school system. In the main, this segregation resulted from:

(1) The deliberate assignment of black teachers to predominantly black schools and of white teachers to predominantly white schools.

(2) The deliberate transfer of white teachers to predominantly white schools and the refusal or failure to transfer black teachers thereto.

(3) The deliberate staffing of predominantly white schools with permanent teachers and of predominantly black schools with temporary teachers.

The racial population figures compiled by the school system starkly revealed the existent teacher segregation (M-1 to 6). Despite professed teacher integration policy on the part of defendants (T.69-72, L-4) as well as expert opinion that integrated faculties make for better education (T.5074-76, 6005, A-24, pp. 35, 38), the pre-

40. This process had started as early as 1949 when the Strayer Report was published (A-16). Most of its recommendations, designed to halt and reverse the deterioration of the school system, have not been carried out (T. 2234, A-33).

dominantly white schools were staffed by predominantly white teaching staffs (T.732-33, V-3, M-1 to 5, P-4 to 8). For example, as of October, 1965, Wilson Senior High School had 61 white and 5 black teachers (T.3012, L-3), and Deal Junior High School had 49 white and 7 black teachers (T.2893, L-3). On the other hand, predominantly black schools have virtually no white teachers (L-3).

Absolutely no attempt was made to assign or transfer teachers in order to insure integrated faculties (T.2989). Although no teacher has any vested interest in any particular assignment and the school system has absolute transfer and assignment power (T.2988), it is clear that racial considerations governed both (e.g., T.2994-95, 2959-61). Even putting aside policy considerations of achieving bi-racial faculties, it is apparent that a random assignment and transfer program in a school system in which black people constitute more than 75% of its total number of teachers (T.735, A-3, pp. 22-24, L-3) would have produced diametrically different patterns than those pertaining at the time of trial.

The conclusion is inescapable that black teachers were deliberately assigned to predominantly black schools and white teachers to predominantly white schools. This was accomplished by initial assignment or by the transfer of white teachers to predominantly white schools while freezing black teachers into predominantly black schools. The testimony

of Assistant Superintendent Koontz left no room for doubt that black teachers are as rigidly segregated as the pupils⁴¹ in their classrooms.

* * * *

It is true, as appellants delight in stressing at every available opportunity, that the trial judge consistently absolved defendants of open segregatory design, a conclusion which, incidentally, appellees do not share. But in every instance where such absolution was tendered, it was done so in such a backhanded way that it is obvious that Judge Wright was more interested in cushioning the effect of his decree rather than castigating defendants as reality demanded. For example, after clearing the Board of Education of de jure segregation, he states that "it is impossible not to assume that the school administration is affirmatively satisfied with the segregation which the neighborhood policy breeds."⁴² 269 F. Supp. 419.

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41. Assistant Superintendent Koontz' lame -- and untrue -- explanation that teacher segregation in the junior high schools was due to the fact that some were formerly in Division One and others in Division Two, which he first gave as "the only explanation I can give" (T.2897), was changed, after cross-examination had thoroughly discredited it, to merely "a reason" (T.2900).
42. "But the fact that the Board believes in neighborhood schools for racially neutral reasons which alone suffice to explain the initiation and retention of that policy does not settle the matter; for these facts in no way cancel the possibility that the Board has concurrently favored it for racial reasons which are forbidden. If a valid purpose is in fact joined by an outright segregatory purpose, the court has no doubt that a de jure case has been established." 269 F. Supp. 418.

As for Dr. Hansen, after concluding that he "was then and is now motivated by a desire to respond . . . to an educational crisis in the District school system," Judge Wright then proceeded to characterize the track system as follows:

"On the other hand, the court cannot ignore the fact that until 1954 the District schools were by direction of law operated on a segregated basis. It cannot ignore the fact that of all the possible forms of ability grouping, the one that won acceptance in the District was the one that -- with the exception of completely separate schools -- involves the greatest amount of physical separation by grouping students in wholly distinct, homogeneous curriculum levels. It cannot ignore that the immediate and known effect of this separation would be to insulate the more academically developed white student from his less fortunate black schoolmate, thus minimizing the impact of integration; nor can the court ignore the fact that this same cushioning effect remains evident even today. Therefore, although the track system cannot be dismissed as nothing more than a subterfuge by which defendants are attempting to avoid the mandate of Bolling v. Sharpe, neither can it be said that the evidence shows racial considerations to be absolutely irrelevant to its adoption and absolutely irrelevant in its continued administration. To this extent the track system is tainted.

The court does not, however, rest its decision on a finding of intended racial discrimination. Apart from such intentional aspects, the effects of the track system must be held to be a violation of plaintiff's constitutional rights. (See Opinion of Law.) As the evidence in this case makes painfully clear, ability grouping as presently practiced in the District of Columbia school system is a denial of equal educational opportunity to the poor and a majority of the Negroes attending school in the nation's capital, a denial that contravenes not only the guarantees of the Fifth Amendment but also the fundamental premise of the track system itself."

269 F.Supp. at 443 (footnotes not included)

SUMMARY OF ARGUMENT

I

PRELIMINARY ISSUES

A.

Appellants Lack Standing

The "parent-appellants" and "appellant" Hansen in his individual capacity lack standing to intervene herein as a matter of right because they have not demonstrated and/or specified the requisite substantial interest which can only be protected through intervention as required by Rule 24(a) F.R. Civ. Pro. and the cases interpreting same. Appellants Smuck and Hansen, in their official capacities, have no standing to appeal because of their status as a dissenting board member and a retired administrator respectively.

B.

The Separation of the First Cause of Action Was Proper

The separation of the first cause of action for consideration by a three-judge district court while the remaining counts were remanded to a single-judge district court was entirely proper. 28 U.S.C. 2282 and 2284 do not require the convening of a three-judge district court to try causes of action which are in no way whatsoever related to a cause of action clearly requiring such procedure. From every

point of view, such separation is both legally and practically sound.

C.

The Refusal of the Trial Judge to
Recuse Himself was not Error

The mere fact that a judge has delivered a lecture or written an article on aspects of the law which may arise in his court is no ground for recusal. Moreover, motions to disqualify a judge for bias or prejudice pursuant to 28 U.S.C. 144 must not only be timely but must conform strictly to the technical statutory requirements.

II

THE MERITS

A.

The Neighborhood School Policy
of the District of Columbia Vio-
lated the Constitution

A neighborhood school policy which has the effect of confining black or poor public school children in racially or economically homogeneous and demonstrably inferior schools while permitting white and more affluent students to escape from such institutions violates the Constitution of the United States. School administrators have an affirmative duty to alter or terminate such policies when they have the above results.

B.

The District of Columbia Track System
Unconstitutionally Deprived Appellees
and their Classes of Equal Educational
Opportunities

The track system, as practiced in the District of Columbia, was established and maintained because of racial considerations. Its effect was to deny to black and poor public school children educational opportunities afforded to white and more affluent students. By the use of invalid criteria, virtually total inflexibility and a cavalier disregard for the welfare of those most adversely affected by the operation of the said track system, the District of Columbia school administrators thwarted the natural aspirations and subverted the educational potential of almost a generation of black and poor children.

C.

The Compulsory Reassignment of Teachers to Integrate Public School Faculties in the District of Columbia is
Proper

In a school system which professes to adhere to a decade-old policy of faculty integration with no appreciable integration resulting therefrom, it is highly proper -- and, indeed, necessary -- for a federal court to direct the appropriate assignment and reassignment of teacher personnel in order to effectuate the said stated policy objective.

Otherwise, pious and high-sounding shibboleths would suffice for meaningful faculty integration. Moreover, the lack of an integrated faculty has serious adverse effects on the education of all school children.

ARGUMENT

I

PRELIMINARY ISSUES

A.

Appellants Lack Standing

1. The "parent-appellants" and "appellant" Hansen in his individual capacity.

Appellees can add little to the comprehensive opinion of Circuit Judge Wright in granting these appellants the right to intervene pursuant to Rule 24(a) F.R.Civ.Pro.⁴³ In so doing, he carefully concluded that he was, despite appellants' clear failure to meet the requirements of Rule 24(a), permitting intervention only "in order to give the Court of Appeals an opportunity to pass on the intervention questions raised here, and the questions to be raised by the appeal on the merits if it finds the intervention was properly allowed. . ."

43. February 19, 1968.

It might be pointed out that the frantic attempt of these appellants to clamber onto the raft of the three-judge opinion in Hobson v. Hansen, 265 F.Supp. 902, 906, which they claim is "the law of the case", Appellants' Brief, 36, is, to say the least, ingenious. There is a world of difference between plaintiffs who instituted a class action for the realization of fundamental constitutional rights, and these appellants whose wholly unspecific claim amounts to no more than that they "dissent from" the decision of June 19, 1967. A disagreement with the lower court's decision can hardly be raised to the level of a constitutional attack. Moreover, as Judge Wright carefully pointed out, "intervention is concerned with something more than standing to sue: it is concerned with protecting an interest which, practically speaking, can only be protected through intervention in the current proceeding."⁴⁴

44. The absurdity of appellants' position is clearly and starkly revealed in their own words: "In simple terms, the appellees, as plaintiffs below, claimed as a class of Negro parents and children, that the acts of the Board of Education in these matters violated their constitutional rights; while the parent-appellants assert just the reverse, that is, it would violate their constitutional rights to prevent the Board of Education from exercising its untrammelled judgment with respect thereto." (Appellants' Brief, 37)

2. Appellants Smuck and Hansen in their official capacities

a. Appellant Hansen

Appellants apparently base Dr. Hansen's standing as Superintendent on his "being compelled to retire as Superintendent of Schools, as a result of the judgment below", Appellants' Brief, 30, and the fact that he "would still be Superintendent of Schools if Judge Wright's Opinion and Judgment of June 19, 1967 had not been entered and if the Board of Education had not forbidden him to appeal in that capacity." Ibid. at 38. However, the law is crystal clear that appeals taken by public officials qua public officials cannot be maintained after their vacation of the post in question. See Snyder v. Buck, 340 U. S. 15.

Moreover, Dr. Hansen, who was not sued in his individual capacity, was specifically directed by the Board of Education, his immediate superior, not to appeal. To permit disgruntled public officials,⁴⁵ sued only as such, to avoid the effect of a direct and legitimate order by resigning or retiring would be to invite open and blatant violation of official policy and subvert the clear intent of public bodies. The disastrous results of such a principle

45. ". . . the mere fact that a person is hurt in his feelings, wounded in his affections, or subjected to inconvenience, annoyance, discomfort, or even expense by a decree, does not entitle him to appeal from it. . ." 2 R.C.L. 52.

is scarcely difficult to contemplate.

b. Appellant Smuck

Much the same argument can be made as to Mr. Smuck who, as a dissenting board member, seeks to obtain through the judicial process a subversion of his Board's intent not to appeal from the decree below. As the Supreme Court of Washington pointed out in Elterich v. Arndt, 27 P. 2d 1102, an appeal "not having been taken or authorized by the board in its official capacity, but by only one member thereof, is a nullity." (at 1103) In State ex rel. Erb v. Sweaas et al, 107 N.W. 404, the Supreme Court of Minnesota, in dismissing an appeal filed under very similar circumstances, stated:

"The action was commenced against the Board of County Commissioners in their corporate, or official capacity, and, although the individual members were named as respondents, all steps in reference to the proceedings . . . could be taken only by the official action of the board. If the action involved the rights of the individual members the position of the appellants would be tenable; but as it does not, but only the board as an official body, the attempted appeal by two members on behalf of their associates was wholly ineffectual." (at 405)

B.

The Separation of the
First Cause of Action
was Proper

The claim by appellants that the separation of the first cause of action for trial by a three-judge district

court was error is patently absurd. In a real sense, appellants recognize the flimsiness of their position by referring to the "deceptively plausible concept that the first cause of action can stand alone. . . ." Appellants' Brief at 42.

Chief Judge Bazelon has so succinctly yet compellingly undermined all of the arguments raised by appellants that it would be surplusage to reiterate his opinion on that score.⁴⁶

It might be pointed out that the key case upon which appellants appear to rely, Florida Lime & Avocado Growers v. Jacobsen, 362 U.S. 73,^{46a} held that a three-judge district court was required to be convened "in an injunction action challenging a state statute on substantial federal constitutional grounds" and that it had "jurisdiction over all claims raised against the statute" (at 80-81) (broken line emphasis added). Here, however, no claims were "raised against the statute" in Counts 2-6. In every case cited by appellants, there was at least some nexus, however slight, between the various causes of action and the statute under challenge⁴⁷ -- here there is clearly none. Cf. Zemel v. Rusk, 381 U.S. 1.

46. 256 F. Supp. 18.

46a. They also rely heavily on Turner, et al. v. Goolsby, et al., 255 F. Supp. 724, where, in the face of a contention by defendants that a three-judge court lacked power to adjudicate one count of a complaint, the court, being of the opinion that "Counts I, II and III are so interrelated as to present one continuous transaction or set of operative facts," (at 731) denied a motion to sever. "Whether the three judge court should handle this extra claim," the court in its per curiam supplemental opinion concluded, "although not of three judge scope is discretionary." (at 732)

47. The attempt of appellants to squeeze the facts of this case into the mould of fn. 4 of Zemel (at 7) is interesting but hardly relevant. (Appellants' Brief at 48)

In fact, the current trend is to separate out the one-judge from the three-judge issues. Recently, in Heard, et al. and Trayler, et al. v. Rizzo, et al., (two cases), Civil Action Nos. 44151 and 44165, E.D. Pa., a three-judge district court suggested to plaintiffs that "the three-judge court pass on the claims under the Civil Rights Acts, and for the appointment of a Master . . . in order that the community might have a prompt disposition of the serious allegations of arbitrary denial by the Philadelphia police of the civil rights of both adults and juveniles in the Philadelphia Community." (Memorandum in support of order of 1/9/68, at 5).⁴⁸ See also McSurely, et al. v. Ratliff, et al., 88 S.Ct. 1112, where the Supreme Court recently granted a motion to dismiss a direct appeal from a decision of a three-judge district court on the ground that the decision concerned was properly a single-judge one and should, therefore, be heard by a Court of Appeals. In so doing the Court continued a previously granted stay for 30 days "in order to afford the appellants an opportunity to apply to the United States Court of Appeals

48. The complaints involved contained, as the Court pointed out, "two basically different claims for relief involving different types of federal courts and not separated into two separate counts. . . ." Ibid. at 4.

for the Sixth Circuit for a stay."⁴⁹

Finally, it is not without significance that this question has been passed on by the Chief Judge of this Court, a three-judge district court composed exclusively of Judges of this Court, and a single-judge District Court composed of a Judge of this Circuit. In each instance, the separation of the first cause of action has been sustained. Indeed, there has not been a dissenting voice against this wholly logical procedure.

C.

The Refusal of the Trial
Judge to Recuse Himself
was not Error

The only serious contention advanced by appellants in connection with the "Motion for Voluntary Displacement" is that the trial judge delivered a lecture at the New York University School of Law on February 11, 1965, which involved, among other things, a discussion of some of the factors of "de facto segregation". The lecture in question appeared as an article entitled "Public School Desegregation: Legal Remedies for De Facto Segregation," at 40 N.Y.U.L.Rev. 285

49. Cf. Chester, et al. v. Kinnamon, et al., Civ.No. 18869, D.Md., slip opinion, November 14, 1967, in which District Judge Kaufman, while retaining all one-judge issues, "hereby separates and certifies that question [the constitutionality of a state statute] to the Chief Judge of the United States Court of Appeals for the Fourth Circuit. . . . See Hobson v. Hansen, 256 F.Supp. 18" (at 11-12)

(1965) and, in part, in a "Symposium on De Facto School Segregation," 16 W. Res. L. Rev. 478 (1965). In essence, appellants suggest that the authorship of the N.Y.U. lecture indicated that the trial judge "was prejudiced as to both the facts to be found in and the law applicable to the case." Appellants' Brief at 53.

Putting aside all issues of timeliness⁵⁰ and whether the motion was an "Affidavit of Bias or Prejudice" as defined in 28 U.S.C. 144, it is obvious that authorship of legal lectures or articles can hardly be grounds for recusal. Otherwise, judges would have to remain mute in the very areas in which they have expertise and confine themselves to judicial opinions or non-legal subjects. That they are not restricted to silence when they are off the bench is dramatically illustrated by Mr. Justice Fortas' new book, "Civil Disobedience", New American Library, May, 1968, in which he discusses, inter alia, the constitutionality of draft-card burning before the Supreme Court had rendered its decision in a case raising that very issue then pending before it.⁵¹

While conceding that there is no evidence even to

50. Cf. Yates v. Manale, 377 F.2d 888 (1967).

51. United States v. O'Brien, 36 L.W. 4469. Cf. Mr. Justice Black's remarkable series of lectures on various aspects of constitutional law delivered at Columbia University School of Law on March 20-23, 1968, under the auspices of the Jame S. Carpentier Fund.

suggest that Judge Wright was not "psychologically capable of fairly weighing the evidence, and determining and applying the law, disregarding his previous expressions on the subject. . . .", Appellants' Brief at 55, appellants recommend that, because "substantial doubt as to that capability has been and still is being voiced by those who made the opinions of the community", ⁵² ibid., he had "a duty to recuse himself," ibid. at 56. They go on to hint broadly that his published statements suggest "a predisposition in the very matters in which he was asked to make findings of fact and conclusions of law upon only the evidence before him." Ibid., at 57. Accordingly, they blandly conclude, "[I]t is hardly possible that he could have ignored the former in making his assessment of the letter." Ibid. at 57.

To dignify this type of unseemly and totally unjustified insinuation by further analysis would serve no useful purpose. Suffice it to say that the statutory requirements of 28 U.S.C. 144 must be strictly followed, ⁵³ U.S. v. Hanrahan, 248 F. Supp. 471. Moreover, the interdiction of that section is not the mere possession of definite

52. No proof of this remarkable assertion appears anywhere in the record.

53. That this was not even remotely done here can be easily seen by comparing the motion filed by defendants on October 3, 1966, with the detailed requirements of the statute.

views regarding the law, the conduct of a party or even a prejudgment of the matter in controversy, but rather an attitude of personal animus against or favor toward one party. U.S. v. Valenti, 120 F. Supp. 80.

II

THE MERITS

A.

The Neighborhood School Policy of the District of Columbia Vio- lated the Constitution

Appellants' essential argument in this area seems to be that, while recognizing the "tragic . . . plight of public education in the District of Columbia", Appellants' Brief at 59, "[T]he present low educational attainment of many Negro school children in Washington is the result of generations of social deprivation, in housing, in employment, in cultural background -- not in the District's 1965-66 educational system." Ibid. at 60. Ergo, the trial court's "judicial surgery," Ibid. at 60, with reference to directing the school defendants below to file "a plan for pupil assignment eliminating the racial and economic discrimination found to exist in the operation of the Washington public school system" and to bus volunteering children out of their neighborhoods east of Rock Creek Park to "underpopulated

schools" west of the Park, 269 F. Supp. at 407, 517, are, in appellants' words, "radically destructive of the neighborhood school principle" and, therefore, not only "contrary to the outstanding decisions of the Federal appellate courts," Appellants' brief, at 64, but ineffectual as well.

Judge Wright has more than adequately disposed of this issue, both factually and legally, in his opinion. In this connection, see 269 F. Supp. at 410-415, 417, and 502-511. Most of the cases cited by appellants on pp. 64-74⁵⁴ of their brief are conclusively dealt with by Judge Wright.⁵⁵ As he points out, the test in the four circuits⁵⁵ which have ruled that de facto segregation is not unconstitutional seems to be whether "the reviewing court can imagine a reasonable or rational basis supporting the classification." 269 F. Supp. at 506. Judge Wright's conclusion in this area⁵⁶ destroys any such basis.

54. E.g. 269 F. Supp. at 506-507.

55. Deal v. Cincinnati Board of Education, 6 Cir. 369 F.2d 55; Gilliam v. School Board, 4 Cir., 345 F.2d 325, vacated Bradley v. School Board, 382 U.S. 103; Downs v. Board of Education, 10 Cir., 336 F.2d 988, cert. den. 380 U.S. 914; and Bell v. School City of Gary, 324 F.2d 209, cert. den. 377 U.S. 924.

56. "Once nearly complete student segregation is shown in a school system in which de jure segregation had formerly been the rule, when challenged the burden falls on the school board to show that the observed segregation stems from the application of racially neutral policies. In this litigation defendants have exposed and explained their neighborhood policy and shown that this is the agent responsible for the segregation." 269 F. Supp. at 417-18.

The attempt of appellants to distinguish away such cases as United States v. Jefferson County Board of Education, 5 Cir., 372 F. 2d 836, aff'd en banc, 380 F. 2d 385, as being confined to de jure rather than de facto situations⁵⁷ is unavailing. As Judge Wright has shown, the neighborhood school policy was rigidly adhered to by defendants when it maintained racially segregated schools and dispensed with in those instances when its utilization might have had the opposite effect. In this connection, see his comments on optional transfer zones. 269 F. Supp. at 415-⁵⁸ 417.

57. "Although psychological harm and lack of educational opportunities to Negroes may exist whether caused by de facto or de jure segregation, a state policy of apartheid aggravates the harm." United States v. Jefferson County Board of Education, at 868. See also Brown v. Board of Education, 347 U.S. at 494.

58. "We know then (1) that the school administration under the Superintendent is reluctant to assign white pupils to predominantly Negro schools, if only because of the pressure from influential white parents that action stirs. We also know (2) that in this school system where the very large majority of the students is Negro, the neighborhood policy succeeds in placing white students in such a way that few of them are required to attend heavily Negro schools. This evidence, the court feels, is not enough to show that in any real sense the Board of Education has adhered to the neighborhood policy with a segregatory design. However, given the two circumstances above, it is impossible not to assume that the school administration is affirmatively satisfied with the segregation which the neighborhood policy breeds." 269 F. Supp. at 419.

Significantly, on October 9, 1967 certiorari was denied in Jefferson County sub nom Caddo Parish School Board v. United States, 88 S.Ct. 67.

Only days ago, the Fourth Circuit, in Brewer, et al. v. The School Board of the City of Norfolk, Virginia, No. 11,782, an en banc decision, reversed and remanded that portion of the trial court's approval of a desegregation plan for the public schools of Norfolk, Va., for formulation of "a plan with more rational [geographical boundary] lines and to consider alternative plans for pupil assignment." Slip opinion, May 31, 1968, at 11. As the court put it:

"Upon remand, the district court should determine whether the racial pattern of the districts results from racial discrimination with regard to housing. If residential racial discrimination exists, it is immaterial that it results from private action. The school board cannot build its exclusionary attendance areas upon private racial discrimination. Assignment of pupils to neighborhood schools is a sound concept, but it cannot be approved if residence in a neighborhood is denied to Negro pupils solely on the ground of color." (footnotes not included) Ibid., at 11. 59/

Significantly, the court refers to Reitman v. Mulkey, 387 U.S. 369. In that case, the Supreme Court, in affirming a judgment of the Supreme Court of California, held that the electorate of that state could not constitutionally nullify a grant of equality propounded in several open housing statutes. In so doing, the Court thoroughly approved

59. Cf. Raney, et al. v. Board of Education, No. 805, Green, et al. v. County School Board, No. 596, and Monroe, et al. v. Board of Commissioners, No. 740, all October Term, 1967, decided May 27, 1968, in which the Supreme Court struck down two "freedom-of-choice" and one "free transfer" plans.

the examination by its California counterpart of the "immediate objective", the "ultimate impact" and the "historical context and the conditions existing prior to its enactment" of the offending referendum.⁶⁰ A similar analysis here must necessitate a finding that the actions of defendants with relation to the manipulation of the neighborhood school concept "would involve the State in racial discrimination to an unconstitutional degree."

⁶¹
387 U.S. at 378.

B.

The District of Columbia Track System
Unconstitutionally Deprived Appellees
and Their Classes of Equal Educational
Opportunities

Judge Wright's exhaustive analysis (and condemnation) of the track system, 269 F. Supp. 442-492 and 511-514 needs no further elaboration here. Appellants do not seriously question his findings but, in effect, base their opposition on the unsupportable assertion that such an issue "should be left for debate and determination by professional educators and that federal judges have no

60. 387 U.S. at 373.

61. See also Griffin v. County School Board of Prince Edward County, 377 U.S. 218; Burton v. Wilmington Parking Authority, 365 U.S. 715; Evans v. Newton, 382 U.S. 296; United States v. Jefferson County Board of Education, *supra*; and Kinoy, The Constitutional Right of Negro Freedom, 21 Rutgers L. Rev. 387-441 (1967).

proper role in this field." Appellants' Brief at 77. While Judge Wright conceded that ability groupings "can be reasonably related to the purposes of public education", 269 F. Supp. at 512, he found that "the track system amounts to an unlawful discrimination against those students whose educational opportunities are being limited on the erroneous assumption that they are capable of accepting no more." 269 F. Supp. at 514.

Appellants admit that federal judges do have a role in questioning ability grouping programs "where a school board has deliberately prostituted educational testing or ability grouping for segregatory purposes." Appellants' Brief, at 77, fn. But as Judge Wright pointed out:

"Although the track system cannot be dismissed as nothing more than a subterfuge by which defendants are attempting to avoid the mandate of *Bolling v. Sharpe*, neither can it be said that the evidence shows racial considerations to be absolutely irrelevant to its adoption and absolutely irrelevant in its continued administration." 269 F. Supp. at 443

"There is no escaping the fact," he concluded, "that the track system was specifically a response to problems created by the sudden commingling of numerous educationally retarded Negro students with the better educated white

students" 269 F. Supp. at 442.⁶²

C.

The Compulsory Reassignment of Teachers to Integrate Public School Faculties in the District of Columbia is Proper

As a threshold question, appellants have raised the question of the standing of appellees to raise the issue of teacher segregation. As has already been pointed out, Mrs. Carolyn Hill Stewart remained a party plaintiff, albeit a nominal one, throughout the action -- and still remains one to this day. She did not formally withdraw, did not retain new counsel, and took no action whatsoever to disassociate herself from the case although she attended many sessions of court and offered occasional suggestions to appellees' attorneys.⁶³ On the other hand, appellants

62. "The Court . . . cannot ignore the fact that of all the possible forms of ability grouping, the one that won acceptance in the District was the one that -- with the exception of completely separate schools -- involves the greatest amount of physical separation by grouping students in wholly distinct, homogeneous curriculum levels." 269 F. Supp. 443.

63. Cf. Wheeler v. Durham Board of Education, 363 F.2d 738, 741 where there was a total absence of teacher-plaintiffs. Yet the court freely discussed teacher segregation and recommended means for eliminating it including one that "the order should encourage transfers at the next session by present members of the faculty to schools in which pupils are wholly or predominantly of a race other than such teachers!"

themselves, in view of the withdrawal of Lawrence A. Wilkinson, Appellants' Brief at 4, lack a teacher-⁶⁴ appellant.

On the merits, appellants concede, as they must,⁶⁵ the trial court's conclusion "that the Board of Education has an affirmative duty to take appropriate steps for the desegregation of the faculties and administrative personnel of the District's public schools." Appellants' Brief at 84. The trial court, finding incontestable proof of "pervasive" personnel segregation, 269 F. Supp. at 426, concluded that "an intent to segregate has played a role in one or more of the stages of teacher assignment."⁶⁶ Ibid., at 429.

64. However, appellees do not stand on this technicality since they firmly believe, like Judge Wright, that teacher integration seriously affects the quality of education received by black students. 269 F. Supp. at 502.

65. See Bradley v. School Board, 382 U.S. 103; and Rogers v. Paul, 382 U.S. 198. In Jackson v. Marvell School District No. 2, 389 F.2d 740, the Eighth Circuit stated, in condemning a plan for faculty desegregation, that "[C]onspicuous by its absence is any provision relating to . . . compulsory assignment of members of the faculty from one school to another." (at 745)

66. "In short, what little hard evidence has been introduced concerning initial teacher assignment itself intimates deliberate segregation, if merely the self-segregation of the teachers condoned by school officials. Furthermore, the court cannot forget one remarkable fact: in 1962-1963, eight years after 'integration,' in a school system short on white students and white teachers, the faculties of 15 of 17 predominantly white schools were 100% white. Absent explanation -- none was proffered -- only one reasonable inference can be drawn: something resembling systematic segregation had been at work. And given that assumption, defendants' general profession of color-blindness in faculty assignment from 1954 on is exposed as misrepresentation. Apart from

In Brewer, supra, the Fourth Circuit, after observing that the school board had amended its plan by providing for the elimination of faculty segregation, slip opinion, at 2-3, indicated as follows:

"The goal of faculty integration is not the allocation of teachers on either a token or a quota basis. The pattern of faculty assignment should be designed to avoid identification of any particular school as predominantly Negro or white. The evidence discloses the difficulty of reaching this goal, but it does not establish that attainment is impossible. Elimination of this remnant of the city's dual system of schools should proceed on a realistic timetable set by the board subject to the approval of the district judge." (Ibid., at 5)

Simply stated, Judge Wright lost patience with professed teacher integration policies which had "proved barren of fruit." 269 F. Supp. 427.⁶⁷

CONCLUSION

The plight of the underprivileged black and white school children living in the District of Columbia is a tragedy of catastrophic proportions. Ghettoized by "cellophane

this, many darkened areas still are clinging to the architecture of defendants' teacher assignment policies, and it was on defendants that the duty to illuminate these areas fell. Accordingly, the court finds that an intent to segregate has played a role in one or more of the stages of the teacher assignment; in exactly which stages the intent has intruded -- with whom primary guilt belongs: teachers, principals, higher school officials, or all of them -- the court does not and need not pinpoint." 269 F. Supp. at 429.

67. See Judge Wright's extensive analysis of teacher segregation, 269 F. Supp. at 421-429. See also Davis, et al. v. Board of School Commissioners, 5 Cir., No. 25,162, slip opinion, March 12, 1968; Kemp v. Beasley, 389 F.2d 178, 187.

curtains" that enforce a racial isolation every bit as restrictive as plantation housing patterns, they are forced to attend overcrowded, understaffed and otherwise inferior public schools where whatever initiative they may have had to achieve their maximum potential has been systematically destroyed by these factors reinforced by a rigid curriculum classification program that condemned them to, at the very best, a second-class education. The result -- stifled minds, blighted hopes, thwarted lives and a steady drain on the nation's human resources.

Counsel fully realize that this is a conclusion to a brief and not a sociological treatise. On the other hand, as human beings, they have been deeply affected by what they have learned during the long trial of this action, and from the recent Report of the National Advisory Commission on Civil Disorders. Emotions, of course, play no determinative role in the resolution of legal controversies, but to deny that they exist or that they affect litigants and lawyers alike would be less than candid.

While we tend to agree with Judge Wisdom's observation that only "a national effort, bringing together Congress, the executive, and the judiciary may make meaningful the right of Negro children to equal educational opportunities," United States v. Jefferson County Board of Education, supra, at 847, we do not wholeheartedly subscribe to his opinion that

"the courts acting alone have failed." (Ibid.) The federal courts have, with admirable persistency, pointed the way -- what remains to be done is the imaginative employment of all of the awesome power at their disposal to save the minds and souls of the disadvantaged black and white children whose guardians they have perforce become. In this connection, Judge Wright has now taken his stand and his "parting word" is particularly appropriate:

"It is regrettable, of course, that in deciding this case this court must act in an area so alien to its expertise. It would be far better indeed for these great social and political problems to be resolved in the political arena by other branches of government. But these are social and political problems which seem at times to defy such resolution. In such situations, under our system, the judiciary must bear a hand and accept its responsibility to assist in the solution where constitutional rights hang in the balance. So it was in Brown v. Board of Education, Bolling v. Sharpe, and Baker v. Carr. So it is in the South where Federal courts are making brave attempts to implement the mandate of Brown. So it is here." 269 F. Supp. at 517.

As enormous as this task may be, it can -- and indeed must -- be accomplished if equal educational opportunities are, at long last, to be afforded to these neglected and abandoned American children, because, as President Johnson stated on July 27, 1967, "there is simply no other way to achieve a decent and orderly society in America."⁶⁸

68. Report of the National Advisory Commission on Civil Disorders. Bantam Books: 1968, xv. ✓

* * * *

The most recent reference to the essential logic of the court below is perhaps the single most compelling reason for affirmance. On June 7, 1968, the Court of Appeals for the Second Circuit, in Norwalk CORE, et al. v. Norwalk Redevelopment Agency, et al., No. 227, September Term, 1967, in allowing affected tenants to challenge an urban renewal relocation program for the City of Norwalk, Conn., stated:

"'Equal protection of the law' means more than merely the absence of governmental action designed to discriminate; as Judge J. Skelly Wright has said: 'We now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a wilful scheme.' Hobson v. Hansen, 269 F. Supp. 401, 497 (D.D.C., 1967)." (Slip opinion at 2618)

The judgment below should be affirmed.

Respectfully submitted,

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June 6, 1968

REPLY BRIEF FOR APPELLANTS

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,167

CARL C. SMUCK
a Member of the Board of Education
of the District of Columbia,
Appellant

v.

JULIUS W. HOBSON, *et al.*,
Appellees.

No. 21,168

CARL F. HANSEN,
Superintendent of Schools of the
District of Columbia,
Appellant.

v.

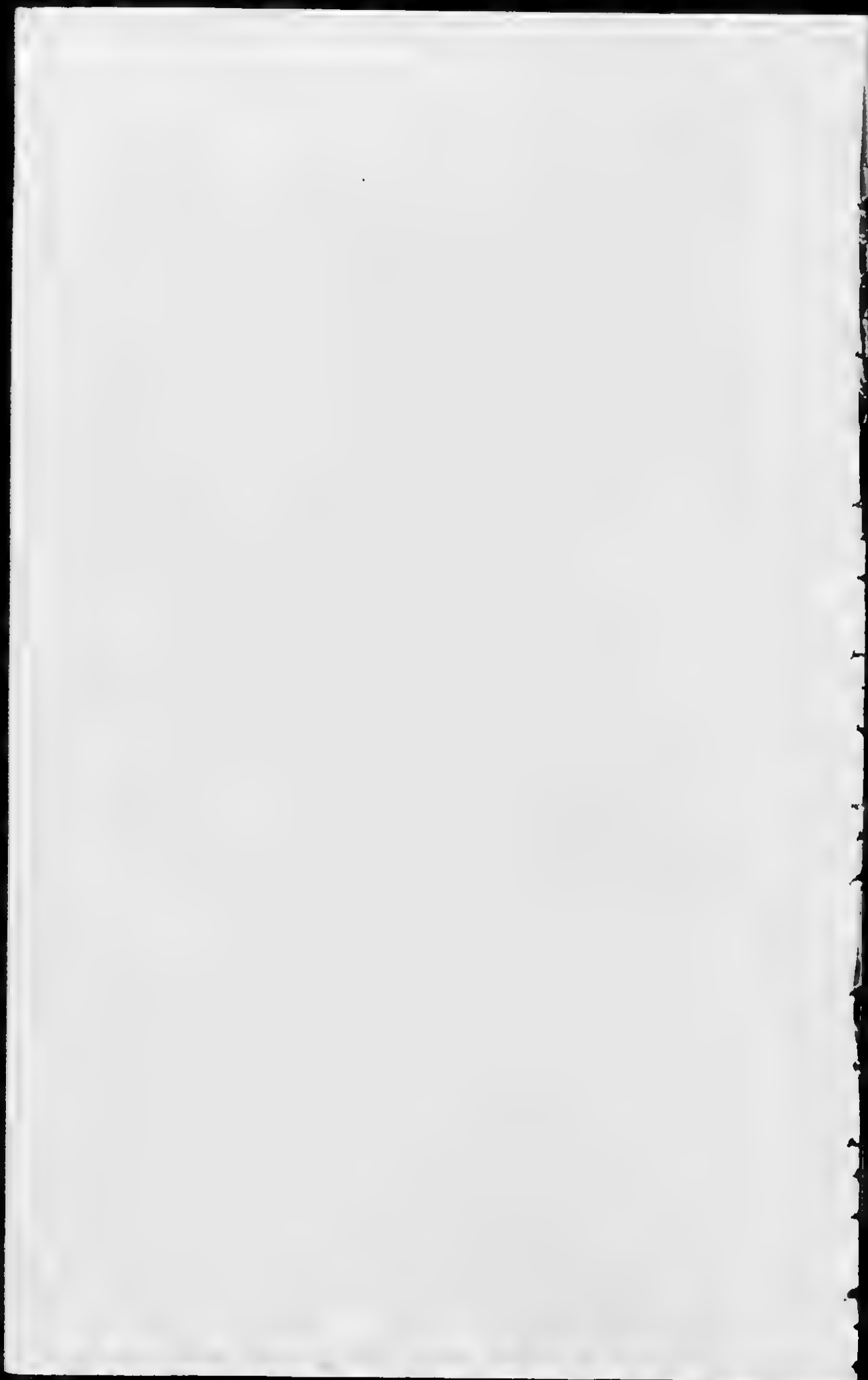
JULIUS W. HOBSON, *et al.*,
Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED JUL 2 1968

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(i)

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IN THE
UNITED STATES COURT OF APPEALS
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No. 21,167
CARL C. SMUCK
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v.

JULIUS W. HOBSON, *et al.*,
Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANTS

PRELIMINARY ISSUES

STANDING TO APPEAL.

Appellees' contention that the Appellant Hansen has no "standing" to maintain his appeal, notwithstanding the authorities cited and the significant and personal interest shown by him, is emasculated by the recent decision of the

United States Supreme Court in *Flast v. Cohen*, 36 L.W. 4601 (June 10, 1968) holding that, henceforth, a taxpayer, *qua* taxpayer, had sufficient interest in governmental expenditures of his tax moneys to seek judicial review of the ways in which and the purposes for which the government proposed to spend them. The Appellant Hansen here, in addition to his personal interest, has claimed the taxpayer's interest as well, (J.A. 392), and (upon the assumption that the rule of *Frothingham v. Mellon*, 262 U.S. 447 (1923) would continue to be controlling law) Appellees neither disputed the claim nor undertook to reargue the merits of *Frothingham*. Now, by reason of *Flast v. Cohen*, *supra*, the "taxpayer's" interest in the legality of the use of tax revenues is, without more, sufficient to allow him to proceed here.

Moreover, the Appellees continue to insist that the Appellants Hansen and Smuck, being or having been "public officials," lose their right to appeal an adverse decision if they relinquish, however reluctantly, the office held, or cannot speak for a majority of the membership of the agency they were sworn to serve. Thus the Appellees ignore the substantial and unique individual interests advanced by each Appellant and, quite simply, stand upon the proposition that public officers cannot ever refuse to accede to their agency's capitulation to an adverse judicial decision, no matter the impact upon their own honor and fortunes. That analysis overlooks the fact that, in defending the actions taken by such officers, the agencies for which they work stand in a fiduciary relationship to them. When the agency abandons its employee who has to that point accepted and relied upon a gratuitous defense when he might have made his own defense from the beginning had he suspected his employer's good faith in offering to defend him, then at the very least He is entitled to try to finish what he trusted his employer to do at the outset. Upon such reasoning the Supreme Court has allowed a labor union to intervene to appeal from a decision adverse to the National Labor Relations Board when the Board refused to do so and the union witnessed the sur-

not so.
see Elterich
Arndt

render of interest it had theretofore depended upon the Board to protect. *International Union of Mine, Mill & Smelter Workers v. Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335, 89 L.Ed. 1649 (1945). Cf. *Port of New York Authority v. Baker, Watts & Co.*, U.S.App.D.C. No. 20870 (March 8, 1968)

Cases such as *Snyder v. Buck*, 340 U.S. 15 (1950), *Elterich v. Arndt*, 27 P.2d 1102 (Sup.Ct.Wash. 1933), and *State ex rel. Erb v. Sweaas*, 107 N.W. 404 (Sup.Ct.Minn. 1906), cited on pages 33-34 of Appellees' Brief, are not in point. In *Snyder v. Buck*, *supra*, a retired paymaster of the Navy purported to be continuing to represent his principal's interest in taking an appeal from an adverse judgment below. And in the state cases, minority members of official agencies purported to represent those agencies in taking appeals from adverse judgments. In none of those cases did the Appellants assert an individual interest as opposed to the official interest for which they were no longer authorized to speak. In the instant case, however, Appellants Hansen and Smuck sought, and were grudgingly granted, leave to intervene individually, and in this appeal seek to protect their personal interests in seeing their official performances of duty vindicated against a finding of malfeasance and abuse of their official powers. They do not attempt to force an appeal upon a recalcitrant governmental agency notwithstanding Appellees would have this Court force them to acquiesce in a decision with which they are in profound disagreement.

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DISQUALIFICATION.

On page 39 of their Brief in footnote 52, Appellees contend that no proof of the "remarkable" assertion that the community at large had misgivings about Circuit Judge Wright's impartiality herein appears "anywhere in the record." Appellees apparently have overlooked Exhibits B through H to Defendants' (below) Motion for Voluntary

Displacement, appearing at pages 77 through 93 of the Joint Appendix.¹

However, the substance of their response to the suggestion that Circuit Judge Wright either was not or did not appear impartial seems to be that Mr. Justice Fortas' authorship of a book on civil disobedience somehow justified Circuit Judge Wright's seeming implementation of his academic views when the vehicle therefor conveniently appears in litigation before him. However well-reasoned the public policy statement and however well-intentioned the judicial act, when they coincide in the affairs of the same judicial official in that order, a "disinterested reader" of the former "... could hardly fail to conclude that he had in some measure decided (the case) in advance. . . ." *Texaco, Inc. v. F.T.C.*, 118 U.S.App.D.C. 366, 372, which alone would require remand for *de novo* consideration. *Ibid.*

THE MERITS

One recurrent theme of Appellees' Brief is directly at variance with the trial judge's decision and opinion. This is the charge that the school administration has intentionally segregated the District's public schools, and has used every imaginable subterfuge to evade the mandate of *Bolling v. Sharpe*. The record refutes this contention, as do the express findings of the trial judge. No charge could be further from the truth.

¹ Appellants offered on the occasion of their Motion to Reverse and Remand, and renew their offer here, to tender copies of additional editorial comment if this Court so desires.

THE SCHOOL ADMINISTRATION HAS NOT SEGREGATED THE DISTRICT'S SCHOOLS.

Though a few quotations from Judge Wright's lengthy opinion may possibly be plucked out of context in such a way as to imply a finding of the intentional segregation prohibited by *Brown v. Board of Education*, it is submitted that an unbroken reading of that opinion at pages 418 through 419 will leave no doubt that the trial judge found in fact that there was no intentional segregation. Indeed, he expressly said that he would not censure the Board's actions "under *de jure* principles," (Opinion 503), and his holding that the neighborhood school policy was unconstitutional was expressly rested on different grounds. When seen in the light of these findings, and the entire record before this court, the falsity of Appellees' repeated charges of intentional segregation becomes apparent.² The record of the District's school officials in general, and of Dr. Hansen in particular, in bringing the District's segregated school system into compliance with *Brown v. Board of Education* within four months of that decision clearly rebuts Appellees' unjustified charges. Indeed, Dr. Hansen's activities on behalf of desegregation, both before and after *Brown v. Board of Education*, frequently subjected him to criticism as a propagandist for integration. (Tr. 590-96; 601-605).

No one denies that there is a high degree of racial imbalance in the District's schools today. But where the population of a city is over 60 percent of one race and the enrollment of its schools is over 92 percent of one race, it seems somewhat strained to argue that the cause of this imbalance is the pupil assignment policy of the school board.

²Perhaps the most blatant of Appellees' charges is the unsupported assertion that school officials "have done everything in their power to avoid" integration. (Brief for Appellees 16). Equally unjustified is Appellees' attempt to brand Dr. Hansen as a segregationist. See Brief for Appellees 16, 19, 27. Compare, Hansen, *Miracle of Social Adjustment: Desegregation in the Washington, D. C. Schools* (1957). (Dfts. Exh. 7).

The cause lies deeper, in population shifts (the flight of whites, the influx of Negroes), in economic patterns, in residential patterns stemming from sharp diversities in income. That these factors are beyond the control of any school board was recognized by none other than counsel for Appellees in his questioning of Dr. Hansen:

"Q. But, Doctor, what I am getting at is of course you cannot as a school administrator in the District of Columbia cannot create white children to fill the schools, white middle class children, for example. You can't do that with what is at your disposal now, isn't that correct?"

"A. You are quite right, I could not." (Tr. 203-04).

At heart, it is now Appellees' contention that the school officials are to be reprimanded for failure to perform such a miracle.

THE DISTRICT'S NEIGHBORHOOD SCHOOL PLAN IS CONSTITUTIONAL.

Appellees contend that the decisions of the Fourth, Sixth, Seventh and Tenth Circuits holding that *de facto* segregation does not violate the Constitution are "conclusively dealt with" by the trial judge. (Brief for Appellees 41). This may come as something of a surprise to a reader who has searched in the opinion for a discussion of these precedents and found only the barest reference to them, buried in a footnote. (Opinion 506). In point of fact, it is apparent that the opinion simply dodges around these decisions and proceeds on its way to expound a new theory of equal protection of the laws. This theory is that the Constitution requires *extreme* justification for any adverse effects on the "critical rights" of a disadvantaged minority, or (in the District of Columbia) a *majority* which are "unable to translate their superior numbers into political power" or, even when they have majority representation (as Negroes do on the Board of Education), are allegedly represented by persons who are "neither responsive nor responsible" to their will. (Opinion 508, n. 198).

and who were, until 1957, subjected to de jure segregation

The path travelled by the trial court in order to impose this immense burden of justification on defendants is tortuous. While education is certainly a right of great magnitude, the trial judge's extension of the concept of "critical rights" to include education poses grave problems for this test of constitutionality, since the limits of its scope, beyond the recognized areas of voting rights (*Reynolds v. Sims*, 377 U.S. 533 (1964)) and criminal justice (*Griffin v. Illinois*, 351 U.S. 12 (1956)), cannot rationally be delineated or practically applied. One need only consider, in such event, the possible extension of the concept to equally critical areas, such as police and fire protection for citizens, to recognize the impracticability of judicial supervision of details of government. Finally, while the recognition of a disadvantaged *minority* may pose no problems, at least where a separate race is concerned, determinations that a *majority* is politically impotent are surely laden with danger. That the trial judge's theory is contained in the same Constitution which separates the legislative, executive and judicial powers of government seems farfetched. The theoretical flaws and the enormous practical difficulties of this new theory are incisively discussed in a recent issue of the Harvard Law Review, *Hobson v. Hansen: Judicial Supervision of the Color-Blind School Board*, 81 Harv.L.Rev 1511 (1968), to which the court's attention is respectfully invited.

The burden of justification applicable to a *de facto* school segregation case has been stated and applied by the Fourth, Sixth, Seventh, and Tenth Circuits, all of which have held unequivocally that the burden is wholly sustained by the "undeniable advantages" (Opinion 409) of the neighborhood school.³ These holdings are uniquely applicable to the Dis-

³*Deal v. Cincinnati Board of Education*, 369 F.2d 55 (6th Cir. 1966), cert. denied, 389 U.S. 847 (1967);

Gilliam v. School Board, 345 F.2d 325 (4th Cir.), vacated, 382 U.S. 103 (1965);

Downs v. Board of Education, 336 F.2d 988 (10th Cir. 1964), cert. denied, 380 U.S. 914 (1965);

Bell v. School City of Gary, Indiana, 324 F.2d 209 (7th Cir. 1963), cert. denied, 377 U.S. 924 (1964).

trict of Columbia. Here, where only 8 percent of the pupils are white, the countervailing advantages of meaningful pupil integration are almost wholly unattainable. (Passow Report 13). In fact, the trial court has indicated that if 85 percent or more of the pupils are of one race "the educational and social advantages attached to integration disappear." (Opinion 411, n. 9).

Though counsel for Appellees assert that no finding of state action is necessary to the *Hobson* decision (Brief for Appellees 17), it would appear that they cite the recent decision of the Fourth Circuit in *Brewer v. School Board of the City of Norfolk*, No. 11,782 (5-2 decision) and *Reitman v. Mulkey*, 387 U.S. 369 (1967) (4-3 decision), (Brief for Appellees 43), to support the contention that racial imbalance in the District's schools is the product of intentional "state action"—in other words, *de jure* segregation. Appellants submit that reliance on these decisions is misplaced. In the case at bar, Judge Wright expressly rested his holding of unconstitutionality *not* on any findings of "state action" or *de jure* segregation, but on his new theory requiring overwhelming justification for any *de facto* segregation, despite the fact that the condition under attack (racial imbalance) stems from causes other than government action.

In *Brewer, supra*, the Fourth Circuit *held* that intentional, *de jure* segregation was established by the record and by way of dictum *suggested* that a neighborhood school plan might be unsound if residence in a neighborhood is denied to Negro pupils *solely on the ground of color*. But any resident of the District of Columbia is free to establish residence in any neighborhood he wishes. That Negroes reside in every neighborhood in this City is common knowledge, attested to by the fact that in 1965 there was not a single public school in this city with an all white student enrollment.

(Pltfs P-4, P-5).⁴ The District of Columbia is further removed from Norfolk, Virginia, than a map alone will show.

The decision in *Reitman v. Mulkey*, though using the test of "involvement" which has long been the law, rests on a finding of "encouragement" made by California state judges, viewing the whole political and social environment of their state. Far to the contrary, Judge Wright has concluded that the record before this court is inadequate to sustain a finding of intentional segregation sufficient to support a *de jure* case.

THE TRACK SYSTEM IS A CONSTITUTIONAL METHOD OF EDUCATION.

Appellees attack the track system on two fronts: an attempt to show (contrary to the trial court's finding) that the track system was just a subterfuge to avoid desegregation, and an attempt to show that its educational effects were unmitigated disaster. Neither contention withstands scrutiny.

The trial judge expressly refused to find, as he was strenuously urged to, that the track system was, as appellees put it, "designed to . . . restore the Division One-Division Two dichotomy." (Brief for Appellees 19). While Judge Wright spoke of "taint,"⁵ he expressly rested his holding of unconstitutionality not on any finding of intent but, rather, on his theory of unequal classification without overwhelming justification.

⁴Key Elementary School had an all white regular enrollment with Negro pupils present in its special classes for retarded children.

⁵Opinion 443. Whatever this phrase may mean, its application to this case hangs on inferences strained to the breaking point. These appear to be the following: (1) desegregation and the full development of the track system occurred at about the same time, ergo, the track system was designed to avoid mixing the races; (2) it was reasonably foreseeable that a degree of separation (though by no means complete separation as shown by the racial mixture of all tracks) would result from use of the track system, ergo, this system was developed and used for this reason.

Perhaps the strongest barrier to Appellees' renewed efforts to establish *de jure* segregation in the creation and operation of the track system is the character and record of its principal designer. Dr. Hansen's leading role in the speedy desegregation of the District's schools in 1954 has already been mentioned. Some of his further activities on behalf of desegregation have not. Prior to the *Brown* decision, Dr. Hansen, (1) organized and developed publication of the "Handbook of Education," which was criticized by Congressmen as part of a propaganda drive to integrate the District's schools; (2) conducted numerous television programs involving joint participation of Negro and white teachers and students, which made him the object of threatening telephone calls and, (3) was actively involved in workshops sponsored for the benefit of teachers to discuss the practices of integration in other schools. (Tr. 590-93; 595-99). From 1956 through 1960, he made presentations in many southern states concerning the success of the desegregation process in the Washington school system, and helped open the human relations workshop at Tuskegee Institute. At the invitation of the B'nai B'rith Anti Defamation League, he wrote "*Miracle of Social Adjustment: Desegregation in the Washington, D. C. Schools*" (1957) and "*Addendum—Five-Year Report on Desegregation of Washington, D. C. Schools*" (1960). (Tr. 601-05; Dfts. 7 & 8). These works demonstrate Dr. Hansen's philosophy and attitudes toward integration. They expose the charge that he is a segregationist, and that the track system is a device for segregation, as a reckless, unseemly attempt to distort his beliefs and the purposes of the track system.

Whatever may ultimately be decided by educators on the merits of the track system, the record demonstrates that it was designed with great care by highly competent professionals and that its present effects, in operation, far exceed even an increased burden of justification.

The four track curriculum and grouping originated in Dr. Hansen's office and was worked out with the District's school principals and subject-field supervisors during 1955. (Tr.

376; Hansen, *Four Track Curriculum for Today's High Schools*, 34 (1964) (hereinafter, "*Hansen*"). The development of the system took place from early in 1955 until its inauguration with the tenth grade in 1956 and its use, beginning in about 1959, in the elementary and junior high grades. (*Hansen*, 33-34; Tr. 341, 226). Its development involved public discussion and extensive questioning staff work. (*Hansen*, 32-50).

In operation, the honors track has unquestionably produced an enriched curriculum beneficial to the gifted "fast learners" in the District's school system. Of 275 seniors in the honors track in 1959, 185 replied, on a questionnaire, that being in the honors track gave them a sense of accomplishment (36 said no) and that they thought they had improved their achievements by being in an honors group (28 said no). 242 (as against 15 to the contrary) replied that if they were starting their high school program again, they would select the honors track. (*Hansen*, 181). The gifted, as well as the retarded, are entitled to the most that our schools can offer them. For them, one curriculum, cut back to average levels, would be just as much a denial of equal educational opportunity as the *alleged* adverse effects of the basic track.

What, then, of the basic track? The evidence of reduction in the drop-out rate (conversely, the schools' "holding power") indicates that its use has succeeded in increasing the education given to the most difficult students to educate. Defendants' Exhibit 46, an explanation of which is contained in Defendants' Proposed Findings of Fact, H-2 through H-3, (Appellants' Appendix 324-25) shows that the declining "holding power" of the schools was arrested with the class of 1959, the first class that had the benefit of the track system throughout its senior high school career, and that "holding power" has continuously improved since then. A similar graphic demonstration is contained in *Hansen* at page 157. An investigation of the basic track graduates of the class of 1959 revealed that better than 60 percent of

those responding stated that basic track placement helped keep them in school and made it possible for them to graduate.

On a more personal level, appellants note the complaint of a mother whose child was transferred from the basic track to the regular third grade class soon after commencement of the school year following Judge Wright's decision:

Up to this year . . . she was making good progress, learning to read and everything. She was very happy at school.

Now she's in a regular third grade class, and she comes home crying, telling me she can't understand the lessons. . .

I just want to ask him (Plaintiff Julius Hobson) what he intends to do about my child. I don't care if my kids never sit besides a white kid, as long as they get a good education.⁶

Can it be said, then, that this particular method of pupil ability grouping was so arbitrary in its creation and so destructive of the pupils' education that it must be condemned and abolished, not by action of school administrators or parents, not by recommendation of an expert study group, but by one federal judge necessarily reaching his decision without experience or expertise in this field? As Judge Wright himself noted, "The formula for reaching a student who comes to school academically ill-equipped from the start . . . is still one of the unsolved problems in American Education." (Opinion 483). Surely, a single judge, whatever the reach of his ability, is not the person from whom solutions in this complex area should be sought. Unless an educational system is intentionally segregatory or arbitrary and capricious, its continuation or modification should be left to other branches of our political system. Otherwise, the long range consequences of the trial court's

⁶Raspberry, *The Washington Post*, September 15, 1967, Section C, p. 1.

decision may well mark this case as a fatal turning point in the course of public education in this country.

CONCLUSION

Near the close of their Brief, Appellees now urge upon the Federal courts "the imaginative employment of all of the awesome power at their disposal." In plain terms this would appear to be a call for continual judicial administration of the nation's public schools. By assuming administrative control over the public schools in the District of Columbia, Judge Wright has clearly undertaken this role. Here, pupil assignment, teacher assignment, school districting, curriculum content and grouping practices, the extent and allocation of compensatory education programs, all facets of the building program and the schools' relations, or lack of them, with neighboring school systems have been assumed as continuing supervisory duties of the District Court. (Opinion 514-517). Surely, other areas of school administration such as the allocation of all financial resources, methods of instruction, athletic and extra-curricular programs and community relations, to name a few, are not immune from the all-embracing grasp fashioned by the *Hobson* decision.

The dangers and stark impracticalities of this new doctrine have been well expressed by the Amicus Brief for the American Association of School Administrators. Appellants hereby state their agreement with the arguments presented therein.

Appellants stress in closing that the scope of the *Hobson* doctrine is almost unlimited and unlimitable, and that it would commit the judiciary to a course of action dangerous to the future development of public education. School boards and administrators who act in good faith, without racial motives, should be given more room to work out solu-

tions to the increasingly complex problems of modern public education than the narrow corridor reserved to them by the trial court's opinion.

Respectfully submitted,

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**BRIEF FOR AMICUS CURIAE
NATIONAL EDUCATION ASSOCIATION**

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,167

CARL C. SMUCK, a Member of the Board of Education of the
District of Columbia, *Appellant*,

v.

JULIUS W. HOBSON, *et al.*, *Appellees*.

No. 21,168

CARL F. HANSEN, Superintendent of Schools of the District
of Columbia, *Appellant*,

v.

JULIUS W. HOBSON, *et al.*, *Appellees*.

NATIONAL EDUCATION ASSOCIATION, *Amicus Curiae*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED JUN 14 1968

Nathan J. Paulson
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June 14, 1968

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QUESTIONS PRESENTED

This brief for amicus curiae addresses itself only to the issues on the merits of these appeals and not to issues relating to appellants' standing to appeal. In the view of amicus, the questions presented on the merits are these:

1. Is it proper to enjoin the public school administrators of the District of Columbia from operating a "track system," which relies heavily on standardized tests to assign students to curriculum "tracks" that determine the kind of education they will receive when the tests used do not accurately reflect the ability of economically disadvantaged children, and as a result such children, who are preponderant in the District's schools, are assigned to tracks which effectively relegate them to blue collar occupations and from which they cannot escape because of rigidities in the track system?

2. May the administrators of the District's schools maintain optional attendance zones when the purpose of such zones is to allow white students to avoid attending predominantly Negro schools?

3. Must the administrators of the District's schools consider all relevant variables, including the differing needs of various students, lack of facilities and overcrowding in some areas vis a vis other areas, and racial imbalance, in resolving how to allocate students among the schools and how to allocate educational resources?

4. Is it appropriate for a court to order an immediate end to teacher segregation in the District of Columbia in a decision rendered thirteen years after *Bolling v. Sharpe*, 347 U.S. 497 (1954)?

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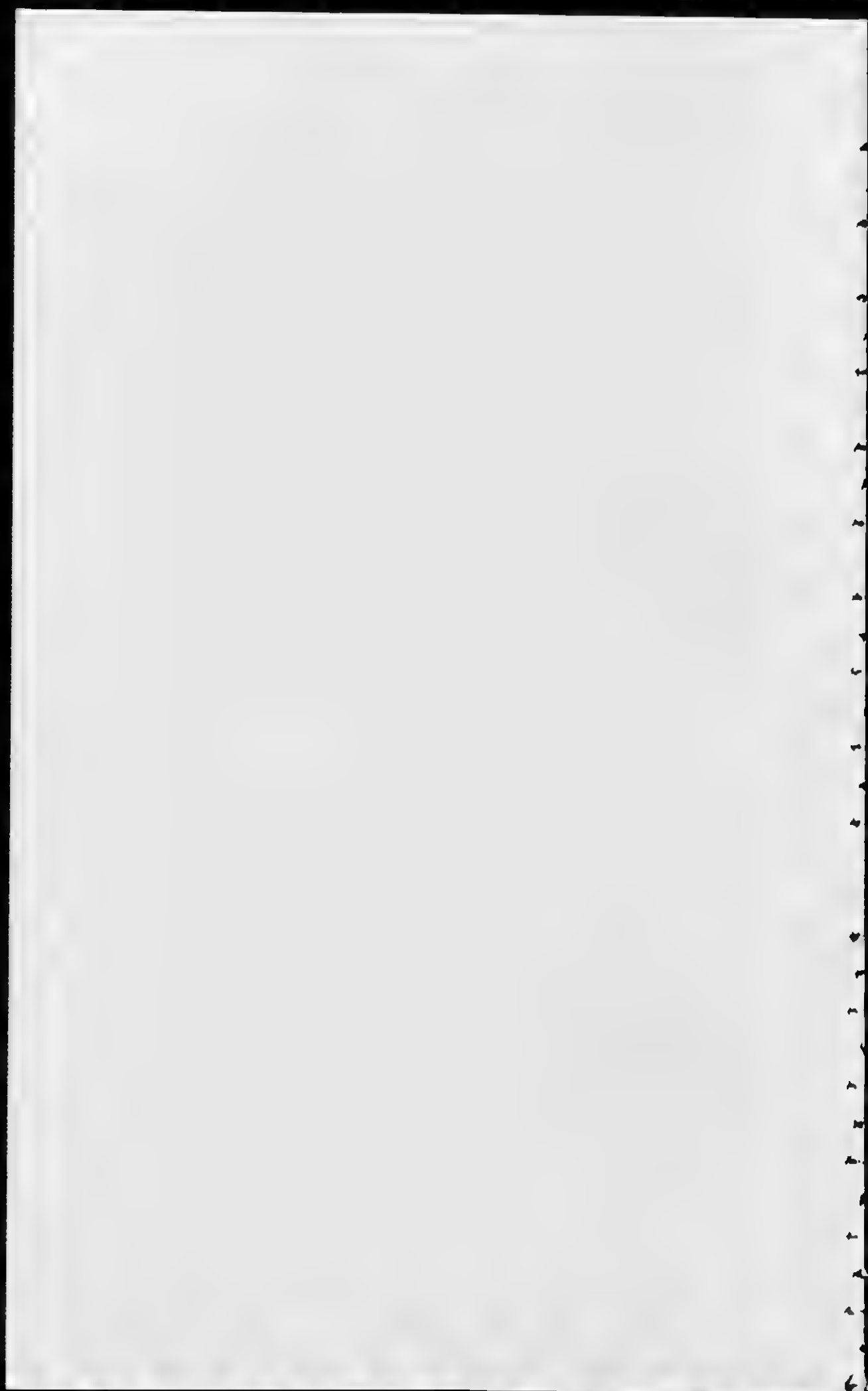
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NATIONAL EDUCATION ASSOCIATION, *Amicus Curiae*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

BRIEF FOR AMICUS CURIAE
NATIONAL EDUCATION ASSOCIATION

The National Education Association is a nationwide organization open to all professional teachers and administrators. Its chief purpose is to work toward better schools

and to improve the professional status of teachers. It has 1,100,000 members and has affiliates in each of the 50 states and in nearly 9,000 local school districts throughout the United States. It files this brief *amicus curiae* with the consent of all parties to the case.

Our discussion will be directed first to the lower court's decision on the track system and then to its decision on the other points in the case. *Amicus* will demonstrate that traditional principles of law and well established precedent support the remedy granted by the court below. References to the opinion of the court below will be to its report in 269 F. Supp. 401, which will be cited as "(Op. . .)."

THE TRACK SYSTEM

The track system admittedly was introduced in the District of Columbia schools to deal with the problem of educating black children in a desegregated setting after the 1954 decision in *Bolling v. Sharpe*, 347 U.S. 497. (Op. 442-43.) The problem was defined by the discovery, made for the first time in 1955, that children in the tenth grade in the District of Columbia schools ranged in achievement all the way from the second-grade level to college level. (*Ibid.*) The lower reaches of achievement were peopled disproportionately by black children. (Op. 443.)

It is well to be reminded that the low achievement of so many black children as of 1955 resulted not from the mere fact that their schools theretofore had been separate but also from a long history of neglect and of segregation throughout our society. It had been only in the year before the *Bolling* decision that the Supreme Court had decided *District of Columbia v. Thompson Co.*, 346 U.S. 100 (1953); until then the black man in the District had been unable even to buy a meal conveniently. Cultural and economic opportunity had been severely limited for thousands of the District's black families. Even more had it been limited in the South whence so many of the more recent black resi-

dents of the District had come. In vast regions the limitations had been nearly as severe as the limitations of slavery itself.

Thus there was a great gulf between masses of black children in the District and the "normal" white child, quite aside from differences in the earnings levels of the parents. There was a gulf in terms of culture, of motivation, of values, of customs, a gulf even in terms of the meaning of words. A child's understanding of vocabulary is the product not of a dictionary but of his experience.

It should not have been surprising, therefore, that there was such a difference in "achievement" as between so many black children and the generality of the whites in 1955. The surprise is that it had not been detected long before. There had not even been city-wide reporting of achievement levels among the pre-1955 black schools in the District. (Op. 442.)

When the Supreme Court lifted the rug, and we were made to see what lay beneath, the problem disclosed was immense and urgent. How could the school system move with vigor to bring its black children to acceptable levels of "achievement" within a reasonable period of time?

The track system was inaugurated in 1956 to cope with that problem.

• • •

As the case comes to this Court, no question is presented, for none was decided by the court below, as to the legal propriety of the track system in theory. The only question decided and now presented has to do with the track system as it was administered and existed in 1967.

But there is one basic aspect of the theory of the track system that bears mention because it is perilously close to being antithetical to equality of opportunity. An underlying premise of the track system was that it is possible to identify early in life those whose innate abilities destine

them to a blue collar adulthood, and that schools can and should identify those children and then deny them anything better than a blue collar "education." (Op. 444-45.) At bottom this idea may not be much different from the ideas of Thomas Jefferson respecting education.¹ But under a constitution more faithful to Jackson than to Jefferson it is dubious. (Op. 515.)

As stated, the idea had no necessary relation to race. If valid at all, it would be valid for any group of children, white or black; there are those among the whites who as adults will wear the blue collar. But that the idea was translated into practice in response to the problem presented by a century of failure to educate the blacks, and for a school system then rapidly becoming predominantly black (Op. 410, 442-43), raised a warning. Would it, however stated in the abstract, simply provide reduced standards of schooling for great numbers of black children at levels of "achievement" that had been produced by long neglect? Was the effect of the Supreme Court's 1954 decision for the District of Columbia to be merely that the preexisting inadequate education was to be continued for many black children save only for the superficial difference that they, or some of them, were to be housed within four walls embracing also some white children?

This called for close scrutiny upon judicial review.

* * *

In our discussion of the track system we rely, for the facts, upon the findings of the lower court. The appellants' brief makes no real effort to attack those fact findings.

The track system was a regime whereby, by successive testing of children as they "progressed" through their schooling, it was sought to identify those of different levels of ability and to provide those in each level with a curriculum—a "track"—purportedly suited to that ability level.

¹ 2 Schachner, *Thomas Jefferson: A Biography* 934-35 (1951).

At the first grade two levels were identified; at the fourth grade three levels; and by the tenth grade four levels. In the senior high school, which begins with the tenth grade, a child in one of the two lower curricular tracks was deliberately not afforded an opportunity to prepare for college; his curriculum was so limited that, if he were graduated, he was prepared at most only for a blue collar occupation.²

In 1966-67, in all but two of the twenty-seven junior high schools and in all but two of the eleven senior high schools the student body was more than two-thirds black. (Op. 412.) In 1965-66, 58.4 percent of the senior high school students were enrolled in the blue collar tracks. (Op. 450.) The whitest of the senior high schools in that year had only 8.1 percent of its students so enrolled; the next whitest had 40.1 percent. The percentage for the other schools, those whose student bodies were more than two-thirds black, ranged from a low of 37.3 to a high of 82.3; all but two had a very large majority in the blue collar tracks. (Op. 451.)

Thus the limited blue collar training of the lower tracks was the fare served to the majority of the District's high school students. And the blacker the school the more likely it was that this fare would be imposed on a given student.

Were our world what it had been in 1900 something, perhaps, could be said for such a regime. It would have had elements of serious injustice, but at least it would have had some rough relationship to the opportunities in the adult world.

But our world today is vastly different from that of 1900 or even of a generation or so ago. In today's world, with its racing technology, blue collar opportunity has narrowed sharply. Where once scores of men were required to dig a ditch, today machines with a minimum of manpower do the digging. Where once typists and clerks were employed in droves, today machines with a minimum of skilled operators take over.

² See generally Sexton, *Education and Income* 175-80 (1961).

Worse: Advancing technology not only reduces the relative number of blue collar jobs but, within the blue collar spectrum, increasingly requires a notable degree of sophistication, adaptability, and verbal and mathematical skills. Hence there was the danger that in the simplified, watered down curricula of the lower tracks the child was prepared, not for blue collar opportunities to the full, but only for a shrinking portion.³

That the large majority of the District high school children were in the blue collar tracks was particularly disturbing for two reasons.

In the first place the District, with its lack of industry, provided far less blue collar opportunity than other cities. In the second place, a disproportionate number of black children populated the blue collar tracks. The resulting limitations on opportunity for so large a segment of the District's children sharply presented one of the severest problems of our central cities—as our society has become more affluent, as our production has soared, and as the average man's real income has risen, the gap in the economic position⁴ and opportunity,⁵ between the black man and his white fellows has widened. See generally *Report of the National Advisory Commission on Civil Disorders* 123-27 (Government Printing Office, 1968).

In its results, then, the track system was failing to meet the needs of children to be equipped for the adult world they would have to live in. Was there something wrong in the system—or was this failure necessarily due to innate inadequacies in the children themselves?

³ *Id.* at 176.

⁴ Bureau of the Census, Department of Commerce, *The Extent of Poverty in the United States 1959-66*, Current Population Reports, Series P-60, No. 54 (1968); Kahn, *The Economics of Equality*, in *Poverty in America* 153, 153-58 (Ferman, Kornbluh, Haber, ed. 1965).

⁵ See Batchelder, *Poverty: The Special Case of the Negro*, in *Poverty in America*, *supra* note 4, at 112, 116-18; Kahn, *The Economics of Equality*, *supra* note 4, at 158-164.

Into this question the lower court made an exhaustive evidentiary inquiry. Emerging, as disclosed in its fact findings and challenged but faintly, if at all, by the appellants here, was a conclusion that in the application of the track system heavy reliance was placed on standardized tests to determine where each particular child should be tracked. (Op. 475-76.) Since a child's assigned track would determine the extent of his opportunity for education, the question whether those tests were reasonably related to the end they served was critical.

The tests were what are known as aptitude and achievement tests. Even the aptitude tests were, however, largely verbal—"essentially a test of the student's command of standard English and grammar." (Op. 478.)⁶

The uncontradicted fact is that the tests were standardized against a "cross section" of the nation's child populace that made them truly suited at most only to the white middle class norm. (Op. 479, 484-85.) Even the test publishers warned that a particular school system using the tests should conduct empirical studies of their "predictive validity." (Op. 488.) Yet in the District no such studies were made. (*Ibid.*) The tests were accepted as measures of a child. But for the black children the white middle class culture was largely alien. The tests could not rationally be expected to predict their performance accurately. In addition to the Lorton study discussed by the court below (Op. 485-87) there are other examples of children with high potential who would have been relegated to the blue collar

⁶ Although more accurate than verbal tests, even non-verbal tests can be biased. For example, children may be shown a series of pictures of animals and asked to identify them. For a child who has never been to a zoo, see *infra* at 8, the answer is a complete mystery. Sexton, *Education and Income*, *supra* note 2, at 43-47. Even most non-verbal tests are group administered and contain a verbal element since the child must be able to comprehend the instructions (which are often written) to perform the test. Cronbach, *Educational Psychology* 189-90 (1954). See generally, Reisman, *The Culturally Deprived Child* 49-62, 74-81 (1962).

tracks under a testing system such as the one used in the District of Columbia.⁷

The difference in culture between the white middle class norm and many children in the District is extreme. In one elementary school, for instance,

"most of the children had never been more than a few blocks from home; they had never been downtown, although some had been to a Sears department store; they did not know what an escalator was, had not seen a department-store Santa Claus, had not been to a zoo." (Op. 481.)

It is plainly arbitrary that the tests in question were accepted as measures of such children. The court below so found (Op. 488), and its penetrating analysis of testing as it was actually conducted in the District's schools (Op. 473-92) is a perceptive contribution fully in accord with what the court described as the view of "modern experts in educational testing and psychology." (Op. 478.)⁸

It is true that the results of tests alone were not supposed to be definitive. A teacher's judgment and other bases for appraisal were supposed to be of importance. But—again upon exhaustive inquiry—the lower court made this finding:

"There can be no disputing the fact that teachers universally tend to be strongly influenced in their assessment of a child's potential by his aptitude test scores.

⁷ E.g., Sexton, *Education and Income*, *supra* note 2, at 48-50; Note, *Legal Implications of the Use of Standardized Ability Tests in Employment and Education*, 68 Colum. L. Rev. 691, 736-37 (1968); see Hoffman, *The Tyranny of Testing* 109-12 (1962).

⁸ Sexton, *Education and Income*, *supra* note 2, at 38-53, 67-69; see Roberts, ed., *School Children in the Urban Slums* 17-159 (1967) (extensive bibliography); Note, *supra* note 7, at 701.

The court put the matter pithily and validly in the observation that "the best that can be said about intelligence insofar as testing is concerned is that it is whatever the test measures." (Op. 478.) Goslin, *The Search for Ability* 126 (1963). See generally *id.* at 55-93, 123-152; Hoffman, *supra* note 7, at 107 ff.; Reisman, *The Culturally Deprived Child*, *supra* note 6, at 49-62.

Defendants' own expert, Dr. Lennon, acknowledged this to be the common experience; and it would defy common sense to think the situation would be otherwise. Although test publishers and school administrators may exhort against taking test scores at face value, the magic of numbers is strong." (Op. 489.)⁹

In short, the track system meant that tests of "ability" patently unsuitable to the vast majority of the children in question were a major, if not well nigh decisive, factor in the determination by the school authorities of whether a child would have an opportunity to receive schooling suitable to something better than the lower reaches of a blue collar world. (Op. 514.)

In any case, whether track assignment was based too woodenly on the standardized tests or whether the determination was otherwise faulty, it was made unmistakably clear in 1965 that the system was fatally wrong. In September of that year, clinical psychologists reevaluated 1272 students then or about to be assigned to the Special Academic Track (the lowest track) by their teachers and principals. It was found that two-thirds—some 820—of those children should *not* have been assigned to that track! (Op. 490.) The lower court was eminently justified in its rhetorical question, "... what of the thousands of students *not* reevaluated with such close scrutiny?" (Op. 491.)

This basic wrong in the track system might have been alleviated in some degree had the system been sufficiently flexible to allow a child an effective opportunity to escape from the confines of a particular track. As expounded in theory the system was said to have substantial flexibility. It was said to allow for movement of an individual child from a lower to a higher track where his achievement warranted it. It was said also to allow for cross-tracking

⁹ "One of the major examples of the misuse of tests is the assumption that a test score is a precise measure of ability, that the child with a 105 I.Q. is brighter than the one with 104 and duller than the one with 106." Note, *supra* note 7, at 735.

whereby a child in a lower track could take individual courses in a higher track. Hansen, *The Four-Track Curriculum in Today's High School* 55-56 (1964). Similarly, movement downward, from a higher to a lower track or cross-tracking to particular courses in a lower track, supposedly was allowed for. See *id.* at 42.

Again, however, the actual facts are damning. As the lower court put it, "... flexibility in pupil programming in the District of Columbia school system is an unkept promise." (Op. 459.) The court's fact findings—substantially unchallenged by the appellants—overwhelmingly support this conclusion. (Op. 459-68.)

The cold statistics show that movement from one track to another (upward or downward) and cross-tracking (upward or downward) were very limited. (Op. 460-68.) And the inquiry made by the court that went behind the cold figures shows why the professed flexibility did not exist. In the elementary and junior high schools the very organization of the curricula and the employment and assignment of teachers made significant cross-tracking virtually impossible. The defendants did not even offer statistics on cross-tracking in that huge portion of the school system. (Op. 464-65.) In the senior high schools also cross-tracking (to say nothing of movement from one track to a higher one) was made difficult, if not often quite impossible, by the organization of the system. Differences as between the tracks both in graduation requirements and in prerequisites for given courses, the very structure of the curricula, imposed a degree of rigidity in itself inconsistent with reasonable freedom of movement. (See *e.g.*, Op. 465.) More than that, there were revealing flashes of evidence that in individual schools teachers followed an "unwritten policy" against allowing cross-tracking. (See *e.g.*, Op. 465-466.)

The architect of the track system—Dr. Hansen—as to whose honesty of purpose there cannot be the slightest question, himself recognized that genuine flexibility was a

sine qua non to the validity of the track system. As he put it, in an aphorism quoted by the lower court,

"Pupil placement in a curriculum must never be static or unchanged. Otherwise, the four-track system will degenerate into a four-rut system." (Op. 463-64.)

The fact is that the District system was deeply rutted.

The conclusion, as a matter of education policy, must be that the track system as it had been imposed on District children was a serious mistake. The *Passow Report*, in Dr. Passow's summary, is eloquent in its understatement:

"The study clearly indicated that the tracking system was as often observed in the breach as it was in adherence to any set of basic tenets. Although tracking practices by no means account for the grave difficulties in which the Washington schools presently find themselves, there are sufficient inequities, inconsistencies and inadequacies in the plan to warrant its abandonment. Thus, the *first recommendation is that any form of city-wide tracking, based on pre-determined city-wide criteria, be abolished and that other plans for coping with the great range of pupil abilities, aptitudes, motivations and interests be substituted instead.*" (Emphasis in original.) Passow, *Toward Better Schools, Summary Passow Report* 35-36 (D. C. Citizens for Better Public Education, 1967).

* * *

There remains the question whether this wrong on the District's children should have been rooted out by judicial decree.

In essence the appellants argue that the lower court exceeded judicial bounds because (a) ability grouping is accepted in the school systems of America and (b) other courts have held that the judiciary should not second guess school authorities on matters such as the suitability of standardized tests.

The answer to that argument is plain.

The lower court did not purport to outlaw all forms of ability grouping. It was at pains to limit its decree only to the track system as applied in the District. (Op. 512.) That the track system, even in theory, was different from many systems of ability grouping elsewhere is clear (*e.g.*, Op. 444-45); that as actually applied here it was vastly different is even clearer. (Op. 512-13.)¹⁰ Whatever may be said—and a good deal can be said both pro and con—as to various other kinds of ability grouping, this case simply does not involve the question.

Nor is it pertinent that other courts have held—or said—that school authorities should not be interfered with by the courts in their nondiscriminatory application of such things as standardized tests. For in none of those cases was there an evidentiary issue, fully pursued, as to the suitability or propriety of the school authorities' administration of its regime such as was involved in this case. The question here is whether, on the evidence *in this case* and the findings properly rendered thereon, the track system as applied to District children was within legal bounds. No precedent cited by the appellants speaks to that issue.

There is an overtone of argument in the appellants' case that reaches beyond the two points we mention. There appears to be a suggestion that a question such as the validity of the track system partakes of a nonjusticiable question, beyond the proper ken of the judiciary whatever the evidence.

Comforting as such a view might be to school boards and administrators, it is submitted that any such suggestion must be rejected. From the time of Marshall, the action

¹⁰ While it is impossible to make a categorical statement as to every public school system in the land, it is true that the District's track system, as operated, was nearly unique in its rigidity and its forced assignment of a child to a specified curriculum in the lower tracks that excluded him from subject areas open to his fellows in higher tracks.

of public officials has been subject to judicial review. Areas forbidden to the courts—*e.g.*, *Johnson v. Mississippi*, 71 U.S. (4 Wall.) 475 (1866)—have been narrow in the past, and, of late, have become narrower still, *e.g.*, *Baker v. Carr*, 369 U.S. 186 (1962). In no facet of our national life is the action of officials of such decisive impact on liberty and the pursuit of happiness as is true of the action of public school authorities. Of course courts should be restrained in their review. But that courts should decline to review, regardless of the evidence of arbitrary or discriminatory action, surely is unacceptable. For this would mean, however delicately put, acquiescence in an administrative dictatorship for our children that would be false to the first principles of democracy.

It has been suggested that the lower court has broken new ground by examining the propriety of the testing system so vital in the District's track system.¹¹ But in other areas, where the possible effects of administrative error are much less significant for both society and individual rights, there is no such judicial acquiescence in ill-founded administrative action as appellants suggest that there must be in the case of the public schools. Courts are accustomed to dealing with the reliance by administrators on data, formulas and tests that do not properly measure or reflect what it is that the administrator is or should be seeking as a guide to the exercise of his judgment. For example, because "averages are apt to be misleading," an agency's action in fixing divisions of individual freight rates between carriers is subject to judicial review to ensure that the agency does not rely upon evidence that merely aggregates results under all the rates subject to division instead of evidence typical of the individual rates being divided. *United States v. Abilene & So. Ry.*, 265 U.S. 274, 291 (1924) (Brandeis, J.). A taxing agency will not be allowed by a court to assess property according to a "familiar formula" where use of the formula leads "to a grossly distorted

¹¹ Note, *supra* note 7, 68 Colum. L. Rev. at 737-39.

result." *Norfolk & Western Ry. v. Missouri State Tax Comm'n*, 390 U.S. 317, 321, 327 (1968). And, perhaps most closely in point to what has happened here, if a regulatory commission fixes a utility's rates on the basis of revenues and expenses in a test year that is a false indicator of the utility's future earnings prospects, judicial review is available, and the court will condemn the exclusive use of the single test year as "an arbitrary restriction." *West Ohio Gas Co. v. Public Util. Comm'n (No. 2)*, 294 U.S. 79, 81 (1935) (Cardozo, J.). Surely judicial review is no less proper when the issue is the suitability of tests oriented to white middle class culture as the administrator's guide in determining the status in school of so many children in the District of Columbia to whom that culture is strange.

Our discussion has laid emphasis upon the black race of a majority of the District's school children. That majority has become so large that the whites are nearly *de minimis*. The appellants have urged that certain of the faults with which we are concerned have to do not with race but with economic status, that the problems are a function of poverty rather than of race.

We do not suggest that the track system was designed to oppress the black race. Take, for instance, the matter of the extraordinary primacy given to standardized tests that has so concerned us. If a given black child lived in an environment, with a cultural background, that approximated the "norm" on which the nationwide standardized tests are based, the primacy accorded to such tests in the track system would have been just as good or bad for him as it was for a white child;¹² there is nothing in the findings of the lower court to suggest that, in the application of such tests, the track system would have discriminated against *that* black child because of his race. But in a society as rigidly segregated as was ours until very recently, and, indeed, with practical segregation prevailing still, even in this city, in vital areas of life—because of housing patterns, habit and still operative social prejudice—the fact is that

¹² See Note, *supra* note 7, 68 Colum. L. Rev. at 691-706.

thousands of black children in the District are quite different from the "norm" against which the standardized tests are validated. (*Cf.* Op. 420.)

Perhaps if the reliance placed upon those tests were the only wrong in the track system, and if all our black children were well-to-do, a court properly could hold that the wrong was not sufficiently serious for judicial intervention. But aside from the fact that reliance on the tests was by no means the only wrong in the system, the truth is, as the lower court's findings bring out very clearly, that most of our black children are not well-to-do. Most of them suffer the deprivations incident to poverty, many in extreme degree, and there is no doubt that those deprivations are more severe for the black poor than for the white poor.¹³

Thus on no realistic view of the case can race simply be shrugged aside, as the appellants' argument seemingly would have it.

In the last analysis, however, the issue with respect to the track system derives from its failure to meet the needs of the children whether they happen to be black or white. (Op. 515.) It could and doubtless did force given white children, no less than black, into an ill-fitting mold by standardized tests applied without benefit even of the empirical studies that the test publishers themselves warned were necessary; a white child, no less than a black, could have been and doubtless was made the victim of an essentially inflexible regime.

Hence, whether the issue here is stated in terms of discrimination denying equal protection, or of arbitrary action denying due process, or of abuse of the administrative discretion delegated by Congress, the resolution of the issue as decreed by the lower court, we submit, should be affirmed.

* * *

We would add a word to commend the form of the lower court's decree. It was purely negative and general: it

¹³ Batchelder, *Poverty: The Special Case of the Negro*, *supra*, in *Poverty in America*, *supra* note 4, at 112.

simply enjoined the District's track system. (Op. 517.) This leaves the utmost flexibility to the District school board and school administration to develop other solutions for their problem. That is desirable.

The lower court's findings contain a most illuminating, critical discussion of the past inadequacies of the District's schooling in the vital areas of counseling, remedial and compensatory education, and related matters. (*Eg.*, Op. 468 *ff.*) With large numbers of disadvantaged children, such as are found in the schools of our central cities today, the schools must concentrate upon adequate steps in these areas. Illustrations of the need can be cited at length. There is no better illustration than that of the ghetto dialect to which the lower court referred. (Op. 480, n. 131.)

Obviously some grouping of children is essential. The conventional annual grades, of course, are but a form of grouping. And even when such grades are eliminated, grouping of one kind or other cannot be avoided. But any grouping, especially in the central cities' schools, is bound to be imperfect for particular children, and it is the individual child, not the mass, that the school must be concerned with. This requires the closest attention to two elements: First, the provision of suitable means to appraise a child's particular needs and abilities and second, the provision of suitable means to correct defects, to supply deficiencies, to stimulate and to motivate.¹⁴

There is no doubt that the District's schools have seriously neglected these elements; the lower court's findings are fully warranted. By framing its decree as it did, the court makes it possible for the District now to go forward without judicial restriction with a program to supply these elements more abundantly in the light of the special conditions prevailing in this community. Freeing it of a strait-jacket, the decree has afforded the District school system a great and hopeful opportunity.

¹⁴ Shane, *The School and Individual Differences*, in *Individualizing Instruction*, *The Sixty-first Yearbook of the National Society for the Study of Education* 44-61 (1962).

POINTS OTHER THAN THE TRACK SYSTEM

We turn now to the lower court's decision on points other than the track system. The court's decision, we suggest, fully accords with accepted principle and its decree leaves abundant scope for the District's school authorities lawfully to work out their problems.

Involved are two general issues: pupil assignment and teacher distribution among the District's several schools.

A. Pupil Assignment

There is no doubt whatsoever that the optional or "escape" zones, together with certain elements governing the drawing of geographic boundaries for the several schools, were designed to allow white children to attend "white" schools. (Op. 415-17, 499-500.) Cf. *Brewer v. School Board of the City of Norfolk*, Civil No. 11,782 (4th Cir. May 31, 1968). It is clear, we submit, that this lingering measure of *de jure* racial segregation—so long after 1954—required excision. *Green v. County School Board*, 36 U.S.L.W. 4476, 4478 (U.S. May 28, 1968) (School boards must eliminate dual school systems "root and branch").¹⁵

¹⁵ Many courts have held that where geographic boundaries are drawn with the intent to discriminate racially, the boundaries cannot be allowed to stand. *Wheeler v. Durham City Board of Education*, 346 F.2d 768 (4th Cir. 1965); *Northcross v. Board of Education*, 333 F.2d 661, 663-64 (6th Cir. 1964); *Taylor v. Board of Education*, 294 F.2d 36 (2d Cir.), *cert. denied*, 368 U.S. 940 (1961); *Clemons v. Board of Education*, 228 F.2d 853 (6th Cir.), *cert. denied*, 350 U.S. 1006 (1956); *Monroe v. Board of Comm'rs*, 244 F. Supp. 353 (W.D. Tenn. 1965), *aff'd*, 380 F.2d 955 (6th Cir. 1967), *vacated on other grounds*, 36 U.S.L.W. 4480 (U.S. May 28, 1968).

Even those cases that have held that "de facto" segregation arising from the combination of neighborhood schools and residential patterns is constitutional have recognized this principle. *E.g.*, *Deal v. Cincinnati Board of Education*, 369 F.2d 55, 62-63 (6th Cir. 1966); *Downs v. Board of Education*, 336 F.2d 955, 988 (10th Cir. 1964.); *Bell v. School City of Gary*, 213 F. Supp. 819, 829 (N.D. Ind.), *aff'd*, 324 F.2d 209 (7th Cir. 1963).

Nor is there doubt that extreme disparity in pupil density had been allowed to prevail in the school system with gross overcapacity in some schools and mere capacity or undercapacity in others. And there is no doubt that the schools suffering most from overcapacity were those in the largely black areas (Op. 433-34, 495) where the children were most deprived both because of poverty and because of racial background and whose need, therefore, for the best possible education was most acute. Whether this resulted from sheer administrative inertia,¹⁶ or was more deliberate, cf. *Marsh v. County School Board*, 305 F.2d 94 (4th Cir. 1962), is, we submit, of no particular moment; a revamping of school boundaries was called for that would correct, as far as feasible, this grave fault. The lower court so decreed.

Pending such revamping, the court properly ordered that volunteering children be bussed at public expense from the overcrowded schools to others in a way that would lessen the maldistribution. This was a mild palliative that excites no real opposition from the appellants.

In the revamping of school boundaries, the court's decree leaves to the school authorities great leeway. Most notably, it does not require departure from the traditional neighborhood school concept (Op. 515) or gerrymandering to achieve racial or class integration.

The decision does require, however, that in the revamping, due account be taken of the fact that our schools are intended to be a democratic crucible. (Op. 505.) The revamping must attempt at least to alleviate pupil segregation within the confines of the neighborhood school concept. (Op. 505, 508, 515-16.) This is but the most elementary application of the principles of *Bolling* and of *Brown v. Board of Education*, 347 U.S. 483 (1954). *Brewer v. School Board*

¹⁶ Cf. *Webb v. Board of Education*, 223 F. Supp. 466, 469 (N.D. Ill. 1963); *Blocker v. Board of Education*, 226 F. Supp. 208, 226 (E.D.N.Y. 1964); *Branche v. Board of Education*, 204 F. Supp. 150, 153, (E.D.N.Y. 1962).

of the City of Norfolk, Civil No. 11,782 (4th Cir. May 31, 1968); *Springfield School Committee v. Barksdale*, 348 F.2d 261 (1st Cir. 1961); *Blocker v. Board of Education*, 226 F. Supp. 208, 226 (E.D.N.Y. 1964); *Branche v. Board of Education*, 204 F. Supp. 150 (E.D.N.Y. 1962); see *Jackson v. Pasadena City School Dist.*, 31 Cal. Rptr. 606, 609-10, 382 P.2d 878, 881-82 (Sup. Ct. Calif. 1963); cf. *Green v. County School Board*, *supra*, at 36 U.S.L.W. 4479. It is a very mild recognition of the multiracial and multiclass character of our society and of this community; any other view would introduce into our schools a wholly artificial separation of races and of classes.¹⁷ Whether or not the court went far enough, cf. *Brewer v. School Board of the City of Norfolk*, *supra*, certainly it did not go too far.

The lower court also, although timidly, and in what is hardly more than a hortatory provision, required that the school authorities consider such measures as educational parks, school pairings, etc., that might promote integration. Cf. *Brewer v. School Board of the City of Norfolk*, *supra*. (We emphasize that the court, in its concern with "integration," is concerned, as we understand it, not alone with racial but also with class integration; this is as it should be.) In this requirement the court was most restrained. In view of the difficult administrative problems in such a reorganization of schools this judicial restraint was wise, at least at this time.

¹⁷ Appellants cite cases holding that, as they put it, there is no constitutional duty to eliminate racial imbalance. (E.g., Brief (type-script), at 69.) Many of those cases, e.g., *Deal v. Cincinnati Board of Education*, *supra*, 369 F.2d at 62, *Gilliam v. School Board*, 345 F.2d 325, 328, (4th Cir. 1965), cite with approval *Bell v. School City of Gary*, 213 F. Supp. 819 (N.D. Ind.), *aff'd*, 324 F.2d 209 (7th Cir. 1963). But *Bell* held only that curing racial imbalance "is not so automatically paramount an interest that 'little,' if any, consideration need[s] to be given" to the other benefits arising from the neighborhood school system. (Op. 508, n. 199.) Thus it seemed to contemplate that a school board could be ordered to give some weight to racial balance. That is all that was ordered by the court here.

There is a further guideline drawn by the lower court in one sentence of its discussion of its remedial action that is, we suggest, of great importance. This sentence is:

"Where because of the density of residential segregation or for other reasons children in certain areas, particularly the slums, are denied the benefits of an integrated education, the court will require that the plan [of pupil assignment] include compensatory education sufficient at least to overcome the detriment of segregation and thus provide, as nearly as possible, equal educational opportunity to all school children." (Op. 515.)

This sentence has excited a law review comment that seems to find in it some novelty. 81 Harv. L. Rev. 1511, 1518 n. 39 (1968). We submit that, if it is novel, it is long overdue and is fundamental to any realistic and sensible application of democratic principles.

There is little doubt but that inter-student osmosis is a most effective means for education—it may be the most effective means.¹⁸ If, due to adherence to the neighborhood school concept or otherwise, deprived children are denied the enormous benefit of association with children of more abundant cultural background surely it is axiomatic that school authorities should give real weight to their special need for compensatory measures. The lower court's provision, highly generalized, does no more than to recognize this principle. This, we submit, is the least that a court should do.

If the recognition of such a principle is thought to be novel in the law respecting the action of school authorities, it certainly is not novel in most pertinent analogies drawn from other areas of government regulation. An example

¹⁸ See e.g., Coleman, *et al.*, Office of Education, United States Department of Health, Education, and Welfare, *Equality of Educational Opportunity*, 302-312 (1966).

is found in the area of broadcast licensing. The Federal Communications Commission consistently and with the ratification of the Supreme Court has given preeminent attention to the relative needs of the different communities or groups proposed to be served, taking into account the broadcast service they already receive. *FCC v. Allentown Broadcasting Co.*, 349 U.S. 358 (1955); cf. *Logansport Broadcasting Corp. v. United States*, 93 U.S. App. D.C. 342, 210 F.2d 24 (1954).¹⁹

There is one particular condition that has been permitted to prevail among the District's schools that adds emphasis to the court's general direction that the school authorities give due consideration to the relative needs of the District's school children. In the District, attendance at kindergartens is not required, but the school system purports to offer kindergarten to those who desire it. The offer, however, is most grossly and inexcusably inequitable. Whereas among the so-called white schools kindergartens have been plentiful, the evidence showed that among the other schools they were all too often either limited or nonexistent—and not because of absence of demand therefor. (Op. 439.) It is difficult to understand how this inequity could have been permitted to persist—especially for slum children who most need kindergartens. The universal applause won by the Head Start program of the Office of Economic Opportunity reflects a principle of education that is self-evident: the earlier deprived children are exposed to organized schooling the greater will be their progress toward the cultural and intellectual enrichment necessary for their equality of opportunity.

¹⁹ See also Comparative Broadcast Hearings, 5 P & F Radio Reg. 2d 1901, 1911, n.9 (1965) ("We will examine the need for the specialized service as against the need for a general service station where the question is presented by competing applicants"); Essances Television Assoc., 25 P & F Radio Reg. 479 (1963) (License granted to applicant whose purpose was "to create a non-segregated society in which there will be cultural, intellectual, and economic conditions of complete equality for the races in the Chicago area"); Herbert Muschel, 23 P & F Radio Reg. 1059 (1962).

B. Teacher Distribution.

The lower court's findings disclose that in the "white" schools teachers tended to be white and that in the "black" schools they tended to be black. (Op. 422-26.) It was found, moreover, that the "black" schools tended to be staffed by disproportionate numbers of inexperienced or uncertificated teachers. (Op. 434-36.)

The court's decree requires immediate "substantial" teacher integration, and a longer range plan for "teacher assignment" that in the end will "fully integrate" teaching staffs for each school. (Op. 517.)

The appellants admit that there is "an affirmative duty to take appropriate steps for the segregation of the faculties and administrative personnel of the District's public schools." (Brief (typescript); at 84.) *Bradley v. School Bd.*, 382 U.S. 103 (1965); *Rogers v. Paul*, 382 U.S. 198 (1965). But they appear to plead that the school authorities should be left alone because they are seeking the requisite integration in good faith. Their main quarrel with the decree seems to be its requirement of *steps* toward integration in all schools at once, by forced reassignment of teachers if need be.

In 1964, ten years after *Bolling*, the school superintendent issued a "directive" for maximum effort to achieve "biracial" faculties in all the schools.²⁰ (Brief (typescript), at 21-22, 84-85; cf. Op. 427.) But at the time of the decision below, thirteen years after *Bolling* and three years after the directive, there remained conspicuous failure to do so in many schools. (Op. 427.) We submit that thirteen years is long enough to deal with this vestige of pre-*Bolling*

²⁰ The court below noted that biracial, as used by the school administration, "means simply less than 100% of one race" and *not integrated*. (Op. 427.)

days,²¹ and that the lower court was eminently justified in its decree. *Board of Public Instruction v. Braxton*, 326 F.2d 616 (5th Cir. 1964) (Trial court, which has first responsibility, must do whatever it deems necessary to eliminate discrimination); cf. *Green v. County School Board*, *supra*, 36 U.S.L.W. at 4478.

The lower court revealed its consciousness of the delicacy involved in a required reassignment of teachers. Very deliberately it refrained from prescribing any ratio of black to white teachers (Op. 516) as has been done by some other courts. *Dowell v. School Board*, 244 F. Supp. 971 (W.D. Okla. 1965), *aff'd*, 375 F.2d 158 (10th Cir.), *cert. denied*, 387 U.S. 931 (1967); *Kier v. County School Board*, 249 F. Supp. 239 (W.D. Va. 1966); cf. *Kelly v. Altheimer Public School District*, 378 F.2d 483 (8th Cir. 1967). Moreover, recognizing that the parties' counsel had not addressed themselves to the issue of remedy, it was careful to require immediately only "substantial" integration, with the school authorities left free to work out a longer range plan for "full" integration that could be considered by the court at a later date. (Op. 516-17.)

In this, we suggest, the lower court did no more than the minimum required by the facts. *Jackson v. Marvell School District No. 2*, 389 F.2d 740 (8th Cir. 1968); *Stell v. Board of Public Education*, 387 F.2d 486 (5th Cir. 1967), *relying on United States v. Jefferson County Board of Education*, 372 F.2d 836, 892-94, 900, *aff'd en banc*, 380 F.2d 385 (5th Cir.), *Cert. denied sub nom.*, *Caddo Parrish School Board v. United States*, 389 U.S. 840 (1967); *Clark v. Board of Education*, 369 F.2d 661 (8th Cir. 1966). Faculty integration cannot be prevented by teacher preference. *Jackson v. Marvell School District No. 2*, *supra*, at 745; *Kelly v. Alt-*

²¹ *Green v. County School Board*, *supra*, 36 U.S.L.W. at 4478-79, and cases cited therein; cf. *Singleton v. Jackson Municipal Separate School District*, 348 F.2d 729, 730 (5th Cir. 1965) ("The later the start, the shorter the time allowed for transition").

heimer Public School District, supra, at 499; *United States v. Jefferson County Board of Education, supra*; *Kier v. County School Board, supra*, at 248.²² That, in the last analysis, is about all that the court decreed as a practical matter. Full initiative is left in the school authorities to proceed from that point. Milder treatment of a glaring and pressing problem hardly could be conceived.

CONCLUSION

The judgment of the District Court should be affirmed.

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June 14, 1968

²² In addition, several cases have implied that teachers should be compulsorily reassigned if it is necessary to meet the faculty integration guidelines set by the court. *Monroe v. Board of Comm'rs*, 380 F.2d 955, 960 (6th Cir. 1967), *vacated on other grounds*, 36 U.S.L.W. 4480 (U.S. May 28, 1968); *Clark v. Board of Education*, 369 F.2d 661, 669-70 (8th Cir. 1966); *Lee v. Macon County Board of Education*, 267 F. Supp. 458, 481 (M.D. Ala. 1967), *aff'd mem.*, 389 U.S. 215 (1967); *Dowell v. School Board*, 244 F. Supp. 971 (W.D. Okla. 1965), *aff'd*, 375 F.2d 158 (10th Cir.), *cert. denied* 387 U.S. 931 (1967).

~~MOTION FOR LEAVE TO FILE BRIEF and~~
BRIEF OF AMERICAN ASSOCIATION OF SCHOOL
ADMINISTRATORS, AMICUS CURIAE

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA ^{United States Court of Appeals}
CIRCUIT ^{for the District of Columbia Circuit}

No. 21,167

FILED JUN 24 1968

CARL C. SMUCK

a Member of the Board of Education
of the District of Columbia,

Nathan J. Paulson
CLERK
Appellant

v.

JULIUS W. HOBSON, *et al.*,

Appellees.

No. 21,168

CARL F. HANSEN,

Superintendent of Schools of the
District of Columbia,

Appellant.

v.

JULIUS W. HOBSON, *et al.*,

Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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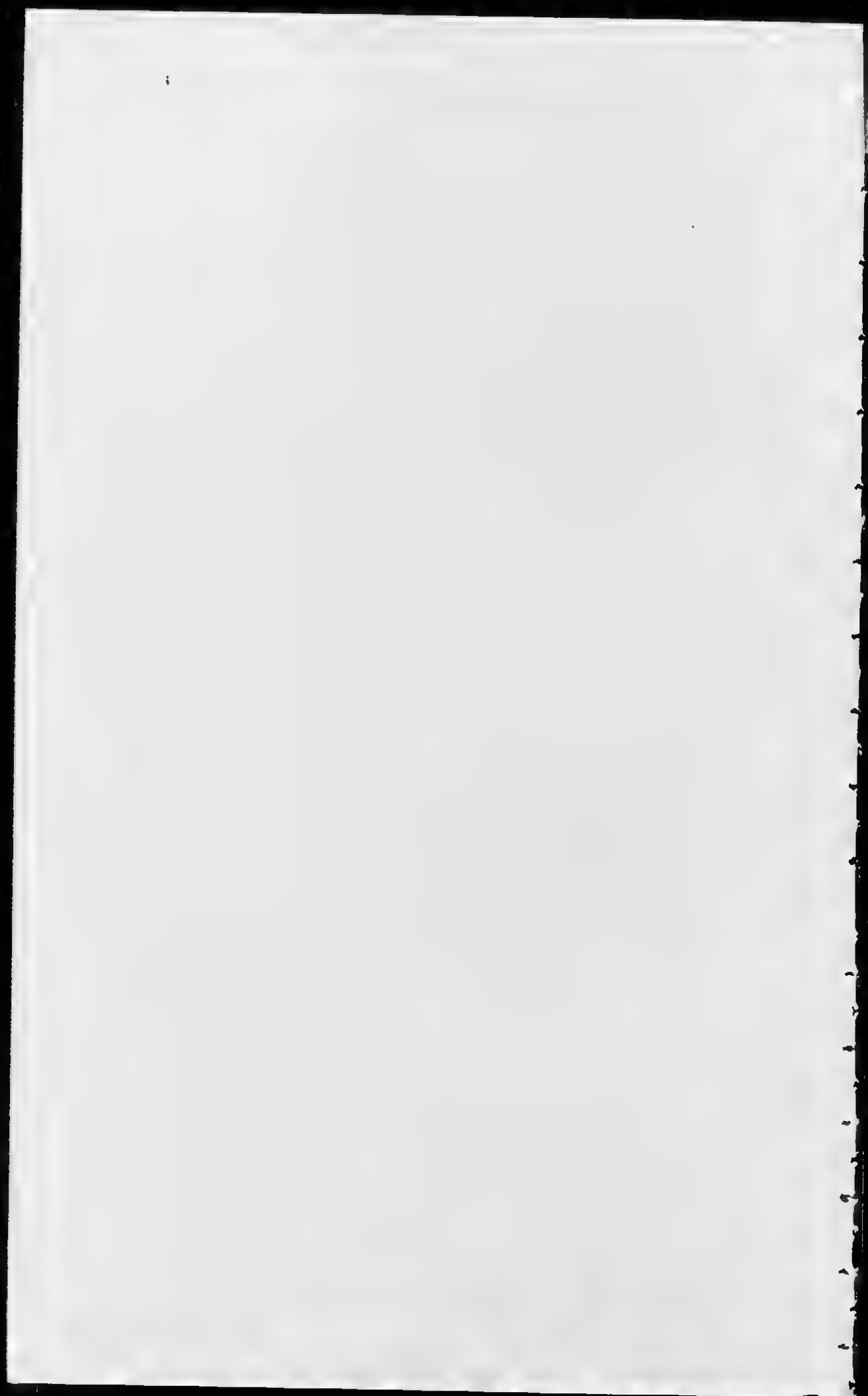


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IN THE
UNITED STATES COURT OF APPEALS
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No. 21,167

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a Member of the Board of Education
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MOTION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE

The American Association of School Administrators, pursuant to Rule 18(j)(2) of the Rules of this Court, respectfully moves for leave to file the annexed Brief Amicus Curiae.

Appellants have consented to the filing of this Brief, as reflected in a letter filed with the Clerk. Appellees have refused to give their consent to the filing of this Brief.

The American Association of School Administrators is a national organization of school supervisors which operates

as an autonomous Department within the National Education Association of the United States. The American Association of School Administrators has, since 1865, served as the voice of school superintendents and other administrators in the educational affairs of this nation. Its present membership is approximately 18,000. Since its inception, the American Association of School Administrators has sought to improve the administration of the public elementary and secondary schools of this nation.

At its 1968 annual convention in Atlantic City, New Jersey, the membership passed a resolution which placed the American Association of School Administrators on record as reaffirming the primary responsibility of our nation's boards of education and school administrators for the determination of the appropriate means to correct constitutional inequities within our public school systems. This resolution reads as follows:

The determination of the policies, structures, and programs of the American public education system logically belongs to state and local boards of education and school administrators, because these are the groups primarily responsible for the quality of education provided in their states or districts.

We resist vigorously the implications inherent in recent court decisions: that the courts are properly concerned with the means chosen by administrators and boards of education to carry out court directives for the provision of education in accordance with federal laws. That recommendations of the court would constitute, where circumstances are suitable, sound educational policy is irrelevant to the fact that the issuance from a court of law of any recommendation concerning school administration renders uncertain the duty of the administrator and the board of education to care for the school system to the best of their knowledge and ability. Even one such decision establishes a precedent which can henceforth be used to supersede the responsibility of the administrator or school board, not necessarily for purposes

beneficial to the quality of education. We believe that in at least one federal decision (*Hobson v. Hansen*) the court has usurped the legal and historic prerogatives of boards of education and school administrators, and we call upon the Association to do all within its power to have the decision appealed and reversed.

The American Association of School Administrators believes that the legal issues presented herein must be considered in the light of the historic relationship between the courts and public school systems, the public interest attaching to this case, and in the broader context of the potential effects of this Court's decision on the administration of the public schools of this nation. Specifically, the Court is respectfully requested to take into account whether the public interest of this country requires the intervention of the judiciary into the administration of public schools under the circumstances prevailing in this case.

Because of movant's long history in and intimate connection with the administration of this nation's public elementary and secondary schools, it believes that it is peculiarly qualified to present the public interest aspects of this case to the Court, all as more fully set forth in the annexed Brief. Although the arguments and appeals of the parties are not expected to be devoid of issues involving the public interest, the parties must necessarily address themselves to

private and diverse issues; in reality the public interest is so predominantly important that it should be the subject of separate presentation.

Respectfully submitted,

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BRIEF OF
AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS,
AMICUS CURIAE

The Issues, as Framed in the Context of the
Public Interest

The fundamental and overriding issue in this case, in terms
of the interest of the general public, is:

In the absence of state-imposed segregation, and
where the record indicates instead a good faith

effort to preserve and protect constitutional rights without segregatory or discriminatory design, may the trial court substitute its own judgment (however astute) for the judgment of the school board and school administrator in the supervision of the schools?

A second issue presented is:

What is the appropriate nature of judicial intervention into educational affairs assuming there is a proper finding of the violation of the constitutional rights of students but there is no history of intransigence by school administrators in delay or refusal to comply with court orders issued to end the unconstitutional situation?

Because the impact of this case may very conceivably extend beyond the rights of the parties directly involved in this litigation and may substantially alter the role which the judiciary has historically played in the educational affairs of this nation, the issues herein presented are of serious concern and controversy within the education profession. That educators do not necessarily agree on the answers to these issues may be seen from the fact that an *amicus curiae* brief in support of the Appellees is being filed by the National Education Association of the United States (NEA).

The import of the issues framed by this case, of course, reach far beyond educational circles. These issues have and will directly or indirectly affect the educational experience of many public school students, the parents of these students, and ultimately, the quality of the education imparted to students in school systems throughout this country. In short, the public interest of which we speak is a national interest and the issues with which we are concerned are fundamental issues affecting the relationship between our courts and educational systems.

Interest of This Amicus

The American Association of School Administrators (AASA) is a national organization dedicated to the improvement of the administration of the elementary and secondary schools of this nation. The AASA functions as an autonomous Department within the NEA. The origins of the AASA date back to 1865 when its predecessor organization was founded by approximately fifty city and state school superintendents. The AASA has grown steadily since that time until today its membership includes approximately 18,000 school administrators located throughout the country. One of the primary functions of the AASA is to serve as the means by which the school administrators of this nation can voice their opinions on educational matters in a cohesive and coherent manner.

The AASA has been extremely concerned with the vital issues affecting public education in recent years. The AASA has recognized that, in appropriate circumstances, modern educational innovations have an important role to play in enabling the nation's educational systems to meet the challenges presented by urban America in the 1960s. In fact, resolutions adopted by the membership at the AASA's 1967 convention approve experiments in bussing and educational parks although supporting the concept of the neighborhood school.

Notwithstanding this express approval of some of the progressive experiments in modern education, the AASA is, nevertheless, vitally concerned with, and strongly believes in, the concept that the public schools in this country are best supervised by school administrators who are vested by law with this responsibility. Accordingly, the AASA believes that such educational innovations as are adopted to cope with the serious problems inherent in providing meaningful and useful instruction to the disadvantaged children of our nation's cities should, absent strong countervailing reasons, be imposed by those best qualified to do so by reason of their training and familiarity with educational problems, namely the educators and not the courts.

In support of this belief the AASA adopted the following resolution with respect to educational decisions and the courts at its 1968 annual meeting:

The determination of the policies, structures, and programs of the American public education system logically belongs to state and local boards of education and school administrators, because these are the groups primarily responsible for the quality of education provided in their states or districts.

We resist vigorously the implications inherent in recent court decisions: that the courts are properly concerned with the means chosen by administrators and boards of education to carry out court directives for the provision of education in accordance with federal laws. That recommendations of the court would constitute, where circumstances are suitable, sound educational policy is irrelevant to the fact that the issuance from a court of law of any recommendation concerning school administration renders uncertain the duty of the administrator and the board of education to care for the school system to the best of their knowledge and ability. Even one such decision establishes a precedent which can henceforth be used to supersede the responsibility of the administrator or school board, not necessarily for purposes beneficial to the quality of education. We believe that in at least one federal decision (*Hobson v. Hansen*) the court has usurped the legal and historic prerogatives of boards of education and school administrators, and we call upon the Association to do all within its power to have the decision appealed and reversed.

Propositions to Which This Brief is Addressed

It is the position of this *amicus* that the evidence in this case tends to establish that the Board of Education of the District of Columbia and its supervising employees, when confronted with the enormous task inherent in providing a meaningful education to the large number of disadvantaged

students in the public school system, have attempted to administer this school system in a reasonable manner without segregatory or discriminatory intent. (This contention is fully substantiated in the brief of the Appellants and it is not the intention of this *amicus* to elaborate upon this point in any great detail in this brief.) Accordingly, this *amicus* believes that the extensive intervention of the courts in this case was improper since there is no legal basis for a finding that the disadvantaged children (whether white or Negro) within the school system have been denied their constitutional rights to an equal educational opportunity with their more affluent (whether white or Negro) compatriots. The tasks of correcting the admitted inequities within the school system and providing a better education to the students thereof should, under the circumstances of this case, have remained with the administrative authorities who are vested by law with this responsibility.

It is the further position of this *amicus*, in the event this court affirms in one or more respects the findings of the lower court that the constitutional rights of the disadvantaged students in the District of Columbia have been denied, that the appropriate remedy, when there has been no abuse of earlier court orders by the defendants, is an injunctive order so framed as to require only that the defendants "cease and desist" from their unconstitutional actions, with the judiciary, of course, reserving the right to review the corrective actions taken by the defendants. In other words, in the absence of demonstrated non-compliance with judicial mandates or the circumvention thereof by the school authorities, this *amicus* believes that the court should refrain from sweeping and affirmative orders the effects of which are to usurp the authority of school officials by substituting court supervision and regulation. The courts should, of course, consider whether the school authorities have acted in "good faith" in implementing the court decrees, and, in a more questionable sense, whether the authorities have been dilatory in protecting constitutional rights.

Historical Role of the Courts in the Supervision of Public School Systems

The courts of this nation have traditionally recognized that school administrative authorities are vested with the primary responsibility for the operation of the public schools of this country. In acknowledgement of this responsibility, the courts generally have refused to intervene in educational affairs so long as the school boards have exercised their discretionary power to prescribe rules and regulations relating to the administration of schools in a reasonable manner, in good faith, and in furtherance of legitimate educational objectives. Or, to phrase this doctrine in another way, the courts will interfere with the exercise of the discretionary power of the school authorities only in clear cases of obvious abuse when the school authorities have acted in an arbitrary and unreasonable manner to abridge the constitutional rights of students or in long-term disregard of constitutional restrictions.

The state court decisions on other aspects of the "division of powers" concept in the history of our government may not furnish perfect guidelines. They do, however, furnish conceptual guidelines which cannot be ignored in the sense that they express, in some depth, the philosophical considerations involved. On the state level, the decisions have arisen in a myriad of contexts, including the actions of school boards with respect to pupil classification and assignment, the transportation of students to and from school, the exclusion or expulsion of students from school,

and the compulsory vaccination of students.¹ But regardless of the factual setting, the reluctance of the courts to substitute their discretion for that of the school administrators is clear in the absence of clear and convincing proof that arbitrary and unreasonable actions by the school authorities have resulted in the violation of the constitutional rights of students. In this connection, the language of a state court in one case is considered illustrative:

"It is properly conceded by the contestant that a school board has a wide discretion in the exercise of the authority committed to it. Courts can interfere only when the board refuses to exercise its authority or pursue(s) some unauthorized course. . . . The wisdom or expediency of an act, or the motive with which it was done, is not open to judicial inquiry or consideration where power to do it existed. . . . Acts in abuse of discretion may be restrained, but the presumption is that there was no abuse. . . . the burden of proving abuse of discretion is on the one asserting it, and it must be established by clear and convincing evidence. . . . It is always to be borne in mind when questions of this kind arise that it is the school board, not the courts, to which the administration of the affairs of a school district is entrusted, and that the right to obtain relief from the courts against the action of the board depends upon a clear

¹ This list of the factual situations in which judicial review of the actions of school boards has occurred is by no means exhaustive. A representative sampling of the many state cases in this area is as follows: *Creyhon v. Board of Education*, 99 Kan. 824, 163 Pac. 145 (1917) involving pupil classification and assignment; *Bowen v. Meyer*, Ct. App. Ky., 255 S.W.2d 490 (1953) involving school transportation; *State v. Marion County Board of Education*, 202 Tenn. 29, 302 S.W.2d 57 (1957) involving expulsion of students; *Board of Education of Mountain Lakes v. Maas*, 56 N.J.S. 245, 152 A.2d 394 (1952) involving vaccination of students; *Bissell v. Dawson*, 65 Conn. 183, 32 A. 348 (1894) involving vaccination of students; *Board of Education of Sycamore v. Wickham*, 80 Ohio St. 137, 88 N.E. 412 (1909) involving pupil assignment; and *State v. Board of Education*, 168 Wis. 231, 172 N.W. 153 (1919) involving exclusion of students.

showing that such action is illegal or arbitrary. A court is not a Super School Board. With the exercise of discretionary powers, courts rarely, and only for grave reasons, interfere. . . ."²

The state court decisions, and the rationale thereof, are not something separate and distinct from the federal law. On the Supreme Court level as well, the reluctance of this judicial body to subject our public educational systems to outside interference so long as the actions complained of are reasonable and related to some end within the competence of the state is also well documented.³

Appropriate Nature of Judicial Remedy to Correct Constitutional Wrongs

Once the court has properly determined that there has been a violation of the constitutional rights of students, whether through the denial of the right of the students to an equal educational opportunity or otherwise, the question arises as to the appropriate nature of the judicial remedy which is designed to correct the unconstitutional situation. Specifically, does the task of determining the proper methods for the correction of the unconstitutional wrong become a duty of the court or should this matter be left to the school administrators responsible for the supervision of the school system, subject, of course, to court review of the adequacy and effectiveness of school plans designed to remedy the constitutional wrong?

Here, the district court order was very broad in scope. The order not only abolished ability grouping and the use of optional zones within the public school system but also required the District of Columbia Board of Education to

²*School District No. 17 v. Powell*, 203 Ore. 168, 279 P.2d 492, 502 (1954).

³See, for example, *Zucht v. King*, 260 U.S. 174 (1922) (compulsory vaccination); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (teaching of German language); and *Pierce v. Society of Sisters of the Holy Names*, 268 U.S. 510 (1925) (attendance at private schools).

transport volunteering students from overcrowded to undercrowded schools; to submit for court approval a detailed plan to alleviate pupil segregation *along court-dictated guidelines*; and, where segregation must necessarily remain, to submit a plan for "compensatory education at least sufficient to overcome the detriment of segregation". The order also required the defendants to substantially integrate each faculty now and to submit to the court a plan of teacher assignment designed to fully integrate each school faculty in the future. Your *amicus* submits that an affirmative decree of this nature under the circumstances of this case was erroneous for legal, practical and philosophical reasons as discussed below.

Legal Precedent as to Nature of Judicial Remedy and Local Compliance Therewith

The Supreme Court answered this question in emphatic and unequivocal fashion in *Brown v. Board of Education (Brown II)*⁴ when deciding the manner of implementation of the prohibition against racial discrimination in the public schools enunciated in *Brown I*.⁵ The Court said in *Brown II*, 349 U.S. at 299:

School authorities have the *primary responsibility* for elucidating, assessing and solving the problems arising from implementation of the constitutional principle that racial discrimination in public education is unconstitutional; courts will have to consider whether the action of school authorities constitutes good faith implementation. [Emphasis supplied.]

Thus, from the very beginning of this historic series of judicial decisions in the last fourteen years which have been concerned with the problems of racial discrimination in our public school systems, the Supreme Court has recognized that school authorities (which are vested with the responsibility by statute and which are manifestly better qualified than the courts by reason of background, training and familiarity to handle educational matters) are the appropriate

⁴*Brown v. Board of Education*, 349 U.S. 294 (1955).

⁵*Brown v. Board of Education*, 347 U.S. 497 (1954).

organizations to determine the proper remedies to cure the constitutional ills of education. Under the *Brown II* rationale, as your *amicus* understands this decision, the functions of the courts are confined to the determination of constitutional inequities and the review of the remedial actions of the school authorities to ascertain whether these actions have, in fact, corrected these constitutional wrongs. Obviously where the wrongs are intentional, or by design, the *enforcement* power of the courts may be the subject of anticipatory decrees, or a decree expectant, perhaps, of avoidance; this obvious rule, relating to the ultimate power of the courts, has resulted in a few isolated decisions more expressive of such ultimate power than of the general rule.

In the years which have followed *Brown II*, some federal courts, particularly those in the southern states, have been confronted with school administrations which have made little, if any, progress toward complying with court orders forbidding racial discrimination in schools. In these instances, and rightfully so, the federal courts as a matter of effective enforcement have felt compelled to hasten the integration process by spelling out in detail the specific steps which the school authorities must take in order to eliminate racial discrimination in the operation of these school systems.⁶ Even in these cases, however, the courts have continued to heed the Supreme Court's mandate in *Brown II* that the school administrators have the primary responsibility for resolving the unconstitutional situation. As Judge Wisdom said in *Jefferson County Board of Education*, 372 F.2d at 869:

⁶See, for example, *United States v. Jefferson County Board of Education*, 372 F.2d 836 (5th Cir. 1966), *affirmed en banc*, 380 F.2d 385 (5th Cir.), *cert. denied* 389 U.S. 840 (1967), in which the Court of Appeals, in remanding the cases consolidated on appeal to the district courts for further proceedings, attached a proposed decree to be entered by the district courts which set forth in great detail the steps which the school systems must take in order to desegregate under a "free choice plan". See also *Stell v. Board of Public Education for the City of Savannah*, 387 F.2d 486 (5th Cir. 1967).

In a school system the persons capable of giving class relief are of course its administrators. It is they who are under the affirmative duty to take corrective action toward the goal of one integrated system.

And, in a very recent Supreme Court decision where the judiciary had been attempting with indifferent success to integrate the public schools of a rural Virginia county since 1954, Mr. Justice Brennan stated:

The obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation. There is no universal answer to complex problems of desegregation. . . It is incumbent upon the school board to establish that its proposed plan promises meaningful and immediate progress toward disestablishing state-imposed segregation. . . Where the court finds the board to be acting in good faith. . . , then the plan may be said to provide effective relief. . .⁷

It is perfectly clear that the circumstances which have sometimes compelled the federal courts, as a matter of effective enforcement, to issue detailed orders to compel school administrators to correct unconstitutional inequities affecting Negroes do not and have not prevailed in the District of Columbia public school system. There has been no showing that school administrators in the District of Columbia have been unable or unwilling to effect "good faith" implementation of any court decrees affecting the constitutional rights of Negro students. On the contrary, there has been only one decision on this subject which directly affected the public schools of the District of Columbia.⁸ And, in the *Brown II* opinion of the following

⁷*Green v. County School Board*, ___ U.S. ___, 36 U.S.L.W. 4476, 4479 (U.S. May 27, 1968).

⁸*Bolling v. Sharpe*, 347 U.S. 483 (1954), the companion case to *Brown I*, which eliminated *de jure* racial segregation in the District of Columbia public school system.

year, the Supreme Court expressly singled out the District of Columbia as an example of a school system where "substantial progress" in the elimination of racial discrimination in public schools had been made. The validity of this appraisal was concurred in by Judge Wright when he admitted that the District of Columbia Board of Education made a sincere effort to desegregate on the neighborhood school plan following *Bolling v. Sharpe*.⁹

Moreover, this "good faith" effort by the school administrators in the District of Columbia to end racial discrimination extends beyond the issue of the integration of the public schools and applies as well to the other areas of alleged constitutional inequity found by the trial court. With respect to the track system, the trial court did not find an intent on the part of school administrators to deny an equal educational opportunity to Negroes.¹⁰ And, on the issue of teacher segregation, which was deemed by the district court to constitute one of the two areas of *de jure* or intentional segregation in the District of Columbia, the trial record does not support this finding of intentional teacher segregation, particularly on the secondary school level.¹¹

In summary, therefore, the school administrators in the District of Columbia have made a "good faith" effort to comply with court orders designed to end racial discrimination in public schools and have generally evidenced no intention to discriminate in the other areas which were found by the district court to have violated the constitutional rights

⁹*Hobson v. Hansen*, 269 F.Supp. 401, 418 (1967).

¹⁰*Id.* at 442, 443, 512 (Note 208).

¹¹When one bears in mind that 78% of the teachers in the entire public school system were Negro during the 1966-67 school year, the statistics in the trial record as to teacher integration assume a new perspective. The evidence in the trial record appears to indicate that a substantial number of predominantly Negro schools had

of Negroes. Under these circumstances, your *amicus* submits that the district court should not have ordered specific solutions to resolve unconstitutional situations affecting student rights where the school administrators have not demonstrated that they are unable or unwilling to resolve the unconstitutional situations by their own methods. The Supreme Court's edict in *Brown II* that the school administrators have primary responsibility for "elucidating, assessing and solving the problems" stemming from the implementation of court decrees concerning racial discrimination remains in full force and effect and should be honored whenever possible.

Practical Considerations Involved in Court Supervision of Educational Affairs

Apart from the legal reasons discussed above, there are many practical considerations which argue against court supervision of public school systems through affirmative orders of the nature promulgated in this case.

Your *amicus* has already indicated the reasons that educators feel that the supervision of our public school systems by a judiciary which is not trained for this purpose would necessarily have a detrimental effect upon the operation of these school systems and these reasons will not be repeated at length here. Your *amicus* would, however, like to quote a recent Sixth Circuit decision which expressed the understanding of that court with the problems facing school administrators:

The School Board, in the operation of the public schools, acts in much the same manner as an administrative agency exercising its accumulated technical expertise in formulating policy after balancing all legitimate conflicting interests. If that policy is one conceived without bias and administered uniformly

a percentage of white teachers which was in excess of the white-Negro faculty ratio throughout the school system as a whole, and that, with the exception of some elementary schools, white teachers were scattered throughout the school system.

to all who fall within its jurisdiction, the courts should be extremely wary of imposing their own judgment on those who have the technical knowledge and operating responsibility for the educational system. . . the fair minded judgment of the school officials is entitled to full consideration in determining whether freedom of choice has been preserved for children within the limits necessary for effective educational practice.¹²

The potentially adverse effect of the district court's order in the instant case upon the operation of our judicial system has recently been discussed from the lawyer's point of view in the law review of one of our nation's leading law schools by an anonymous author of apparently liberal tendencies and certain extracts from this article are worthy of consideration here.

The courts have already undertaken a massive task in correcting racially motivated educational policies; *Hobson* requires that they go further and correct policies which are not invidious but merely unresponsive to the educational needs of Negroes and the poor. This requirement will increase the burden, not only in terms of the number of cases but also in terms of the difficulty of individual cases. . . Nor will the remedies imposed by *Hobson* be easy to administer. . .

. . . A more serious problem arises from the nature of the factual determinations which the court must make. . . There is a serious danger that judicial prestige will be committed to ineffective solutions, and that expectations raised by *Hobson*-like decisions will be disappointed. Furthermore, judicial intervention risks lending unnecessary rigidity to treatment of the social problems involved by foreclosing a more flexible, experimental approach. *

The *Hobson* doctrine can be criticized for its unclear basis in precedent, its potentially enormous

¹²*Deal v. Cincinnati Board of Education*, 369 F.2d 55, 61 (6th Cir. 1966).

scope, and its imposition of responsibilities which may strain the resources and endanger the prestige of the judiciary. Perhaps such shortcomings are a sufficient reason for remitting the problems dealt with in *Hobson* to other institutions for resolution, subject to certain minimum checks designed to prevent irrational choices and ensure that political solutions are devoid of racial motivation. . . .

. . . Nevertheless, the limits upon what the judiciary can accomplish in an active role are an additional reason for circumspection, particularly in an area where the courts can offer no easy solutions. . .

*. . . a school board tired of adversary conflict may decide to follow the court's educational findings without attempting to acquire approval for plans based on opposing theories. Furthermore, when a *Hobson* decision is announced in a district or circuit containing several school districts, it may have a rigidifying effect upon school boards not parties to the case. The boards may feel constrained to follow the court's educational theories, even though they are not strictly binding, because they fear embarrassing and time-consuming litigation. Finally, judicial intervention in the educational field may hinder legislative attempts to consider the problems of poverty and race as a whole and work out comprehensive, interdependent solutions.¹³

The reluctance of lawyers to burden the courts and confuse the educators with a multitude of law suits resulting from sweeping court mandates is not necessarily of recent vintage. Twenty years ago, Chief Justice Jackson, in a concurring opinion, expressed his distaste for the intervention of the courts into the sphere of education in the following manner:

The relief demanded in this case is the extraordinary writ of mandamus to tell the local Board of Education what it must do. The prayer for relief is that a writ issue against the Board of Education

¹³*Hobson v. Hansen: Judicial Supervision of the Color-Blind School Board*, 81 Harv. L. Rev. 1511, 1525-27 (May, 1968).

"ordering it to immediately adopt and enforce rules and regulations prohibiting all instruction in and teaching of religious education in all public schools. . ."

To me, the sweep and detail of these complaints is a danger signal which warns of the kind of local controversy we will be required to arbitrate if we do not place appropriate limitation on our decision and exact strict compliance with jurisdictional requirements. . . . If we are to eliminate everything that is objectionable to any of these warring sects or inconsistent with any of their doctrines, we will leave public education in shreds. Nothing but educational confusion and a discrediting of the public school system can result from subjecting it to constant law suits.¹⁴

Necessity for the Consideration of Factors Other Than Race in School Administrative Decisions Affecting Constitutional Rights

Continuing on the pragmatic level, your *amicus* wishes to examine one additional facet of this problem. The district court, in its preoccupation with its desire to correct the inequities in the educational system of the District of Columbia which adversely affect the disadvantaged Negro, has totally ignored the consideration of other factors which must be weighed by school administrators in the decision-making process. While the proper remedy for the rectification of the Negro's constitutional right to an equal educational opportunity must necessarily involve to a significant degree the use of effective methods to eliminate the unconstitutional situation, school administrators must also act in the public interest and consider the harmful implications of such

¹⁴*Illinois ex. rel. McCollum v. Board of Education*, 333 U.S. 203, 234-235 (1948), a case which ruled that the constitutional principle of separation of church and state precluded the use of public schools for purposes of religious instruction.

methods to insure that the operation of the school system does not founder in the process of correcting the constitutional inequities. The district court, in its orders to the Board of Education, was completely oblivious to the potentially adverse effects of its orders on the administration of the District of Columbia school system.

Beginning with *Brown II*, the courts have generally recognized that there are other matters relating to the administration of schools which must be considered in the implementation of judicial mandates issued to end constitutional violations. As the Supreme Court said in *Brown II*, 349 U.S. at 300 and 301:

In implementing the decision of the Supreme Court that racial discrimination in public education is unconstitutional, the courts may consider problems relating to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts, and attendance areas into compact units to achieve a system of determining admission to the public schools on a non-racial basis. . . the courts will also consider the adequacy of any plans the defendants may propose to meet this problem. . .

In the ensuing years, the federal appellate courts, in decisions implementing the *Brown* decisions, have also recognized that school administrators have to cope with a variety of other problems related to or springing directly from court mandates ending racial discrimination in the public schools. A most recent expression of this awareness by the Supreme Court was voiced by Mr. Justice Brennan in *Green*, 36 U.S.L.W. at 4478, when he said:

Brown II was a call for the dismantling of well-entrenched dual systems tempered by an awareness that complex and multifaceted problems would arise which would require time and flexibility for a successful resolution.

In *Bradley v. School Board of Richmond*, the Fourth Circuit voiced its concern with administrative matters when it stated:

An earlier judicial requirement of general reassignment of all teaching and administrative personnel need not be considered until the possible detrimental effects of such an order upon the administration of the schools and the efficiency of their staffs can be appraised. . .¹⁵

In a similar vein, the Sixth Circuit in *Deal v. Cincinnati Board of Education*, 369 F.2d at 61, expressed its awareness of the problems faced by school administrators and the necessity for flexibility and variety in solving constitutional wrongs in our public schools when it stated:

The bussing of pupils away from the neighborhoods of their residences may create many special problems for boards of education. These include the providing of adequate transportation and proper facilities and personnel for the supervision, education and well being of all pupils. All of this must be accomplished within the Board's budget.

. . . .

In dealing with the multitude of local situations that must be considered and the even greater number of individual students involved, we believe it is the wiser course to allow for the flexibility, imagination and creativity of local school boards in providing for equal opportunity in education for all students. It would be a mistake for the courts to

¹⁵ *Bradley v. School Board of City of Richmond, Virginia*, 345 F.2d 310, 321 (4th Cir. 1965), *vacated*, 382 U.S. 103 (1965). The Supreme Court remanded the cases consolidated herein to the district court, holding it was improper to approve desegregation plans without considering, at a full evidentiary hearing, the impact on those plans of faculty allocation on an alleged racial basis. This remand notwithstanding, however, the appellate court's solicitude for the administrative problems faced by educators is worthy of repetition here.

read *Brown* in such a way as to impose one particular concept of educational administration as the only permissible method of insuring equality consistent with sound educational practice. We are of the view that there may be a variety of permissible means to the goal of equal opportunity, and that room for reasonable men of good will to solve these complex community problems must be preserved.

Some Examples of Potential or Actual Adverse Effects of Court Order on the Local School System

Without attempting to be exhaustive, your *amicus* would like to mention a few specific illustrations of potential or actual adverse effects which the orders of the district court have had or may have on the operation of the public schools in the District of Columbia.

With respect to the integration of faculties, Dr. Geroge Brain, former Superintendent of Schools in Baltimore, Maryland, testified that the compulsory transfer of teachers to assignments not of their liking "would be a bit foolish and a little farsighted, because the teacher undoubtedly in a number of cases would withdraw and find a teacher assignment somewhere else."¹⁶ Such a development would, of course, increase the present deplorably high ratio of colored to white teachers within the school system and would destroy one of the prime objectives of faculty integration, namely making more white teachers available to instruct Negro students.

A similar commentary may be made with respect to additional attempts at student integration which must involve

¹⁶Trial Record at 5078.

in some measure the assignment of white students to predominantly Negro schools. Dr. Hansen testified that previous attempts to integrate students in the District of Columbia, when unaccompanied by adequate measures designed to insure the retention of white students by preserving the quality of their education, have tended to drive the remaining white children out of the public school system.¹⁷ Meaningful integration in a school system where there are presently 92 Negro students for every eight white students is questionable at best and the integration issue approaches absurdity if the orders of the court will have the effect of decreasing the already small percentage of white students still further.

The complete abolition of the previous method of ability grouping in the District of Columbia (the track system) must necessarily have an adverse effect on the ability of the school administrators to provide a meaningful education to the exceptionally slow and the exceptionally quick learners in the school system. A poignant example was recited in a column written by a Negro in one of the leading Washington newspapers shortly after the 1967-68 school year opened. In this article, the author recounted the frustrations of one apparently Negro mother whose 9-year old daughter had been transferred from the basic track to the regular third grade class. Pertinent excerpts from this mother's lament are as follows:

Up to this year. . .she was making good progress, learning to read and everything. She was very happy at school.

Now she's in a regular third grade class, and she comes home crying, telling me she can't understand the lessons. . .

I just want to ask him (Plaintiff Julius Hobson) what he intends to do about my child. I don't care

¹⁷Trial Record at 185, 186, 189.

if my kids never sit beside a white kid, as long as they get a good education.¹⁸

Philosophical Basis for Minimization of Nature of Judicial Intervention into Educational Affairs

On a more philosophical level, one of the cornerstones of our democratic way of life is the education of all the people as a means of insuring the survival of liberty and democracy. As Thomas Jefferson said in a letter to James Madison in 1787:

Above all things, I hope that education of the common people will be attended to; convinced that on this good sense we may rely with the most security for the preservation of a due degree of liberty.¹⁹

and in a similar vein, Daniel Webster also saw the success of the American experiment in democracy as dependent upon popular education:

On the diffusion of education among the people rests the preservation and perpetuation of our free institutions. . . Make them intelligent, and they will be vigilant—give them the means of detecting wrong, and they will apply the remedy.²⁰

An essential ingredient, however, to education's role in maintaining our democratic society is that education be kept independent from outside interference and not be twisted to the advocacy of any particular point of view. The control of education by the exponents of any particular philosophy, whether partial or complete, must necessarily lead to the diminution of the free flow of ideas to the detriment of

¹⁸Raspberry, *The Washington Post*, September 15, 1967, Section C, page 1.

¹⁹R. Ulich, *Education in Western Culture* 121 (1965).

²⁰J. Brubacher, *A History of the Problems of Education* 43 (1947).

the student's ability to think for himself. As Condorcet, a leading figure during the French Revolution, said:

. . . the independence of instruction is, in a manner, a part of the rights of the human race. . . What right would any power, whatever it be, there to determine wherein lies truth, wherein lies error.²¹

It is submitted by this *amicus* that inherent in the encroachment by the judiciary into the affirmative supervision of educational affairs is the danger that the courts may, at some future time, attempt to impose their own philosophy as to the content of curriculum upon our nation's school systems. That such a development is a present possibility (except for the required curricula change inherent in the abolishment of the local track system) is not at issue. But, that the positive and affirmative manner in which the lower court has entered into the supervision of the District of Columbia's public schools (without sufficient need or threat to the power of the courts) has opened the door to the future evolution of such a development and that such a development could conceivably have tragic consequences for both freedom of education and our democratic concepts cannot be denied.

Some Considerations Pertinent to the Abolition of Ability Grouping in the District of Columbia

Before concluding, there is one portion of the court's decree of especially great concern to educators which your *amicus* believes is worthy of separate discussion in this brief because it is completely contrary to fundamental and traditional educational concepts. Your *amicus* refers to the district court's order which abolished the grouping and instruction of students according to ability in the District of Columbia public school system.

The ability grouping concept has deep roots in American educational history. Some form of ability grouping as a

²¹J. Brubacher, *Id.* at 630.

means of providing specialized instruction to the exceptionally slow and the exceptionally gifted students has been used in the public schools of this country since, at least, the latter part of the nineteenth century.²² Indeed, ability grouping in some form is a virtual necessity in an educational system which is required by law to teach all the children who, of course, vary in innate abilities. Without ability grouping, the educators would have no effective method of providing specialized instruction adapted to the ability and needs of the pupils.

A court order of this nature, to the knowledge of your *amicus*, is without judicial precedent. As is fully documented in pages 77 to 79 of the typewritten brief of the Appellants, the courts have consistently upheld the right of school administrators to separate students by ability without court interference so long as the basis for so doing was uniform and without regard for race or color. The judicial authority on this point is clear and will not be belabored in this brief.

Moreover, your *amicus* submits, for the reasons set forth below, that the form of ability grouping previously practiced in the District of Columbia (the track system), when considered in the light of the enormous problems inherent in providing a meaningful education to the disadvantaged children within the school system, was administered by the school supervisors in a "good faith" and reasonable manner so as not to discriminate (intentionally or unintentionally) on a racial basis. There was, therefore, no proper basis in judicial precedent for court interference with the operation of the track system.

The district court based its decision to abolish the track system on a finding of the denial of the constitutional right of the disadvantaged child to an equal educational opportunity as the result of (1) the inadequacy of testing methods to measure the innate abilities of the disadvantaged child

²²E. Cubberly, *Public Education in the United States*, Chapter XV.

with the consequence that the disadvantaged child tended to be assigned to a track on the basis of his socio-economic or racial status rather than his innate intelligence, and (2) the supposed inflexibility of the track system, due primarily to the alleged failure of the remedial and compensatory education programs, which tended to prevent the disadvantaged child in a lower track from progressing to a more advanced curriculum.

Although educators may and do differ as to the validity of testing procedures to measure the innate abilities of the disadvantaged child, the uniform use of testing procedures commonly accepted in educational circles in the District of Columbia public school system as one of the main criteria for pupil placement in the track system can in no way be deemed to be unreasonable or discriminatory in nature. In determining that the application of such testing procedures to the disadvantaged child was improper, the district court exceeded its judicial role in making a decision which should properly be made only by those with the professional competence to do so, the educators.

Furthermore, with respect to the flexibility or the lack thereof in both cross-tracking and the movement between tracks, two observations are pertinent. First, reasonable men could differ as to whether the statistics cited by the district court do, in fact, establish inflexibility of movement within the track system. Secondly, the results of the remedial and compensatory educational programs in the school system (cited by the district court as the primary reason for inflexibility) must be judged in the light of the tremendously difficult task of properly educating the disadvantaged children within the school system. In any event, whether successful or not, it is clear that administrators of the school system had made a reasonable and good faith effort under the circumstances then prevailing to provide, on a non-racial basis, a type of education adapted to the needs of the disadvantaged children. Under these circumstances, the court order abolishing the track system was improper.

A final word should be said concerning the inappropriateness of the all-inclusive nature of the court's order abolishing the track system. Assuming that the district court properly found that there were constitutional wrongs within the track system, the proper remedy should have been the issuance of an order requiring the school administrators to remedy the specific constitutional inequities but nevertheless preserving the framework of the ability grouping plan. Since, as the district court admits, different kinds of instruction for different kinds of students are not unconstitutional *per se*.²³ the issuance of an order directing the school administrators to remedy the precise constitutional wrong would have had the salutary effect of permitting the school administrators to retain specialized instruction adapted to the particular needs of the pupils. In a public school system such as the District of Columbia where it is imperative that specialized instruction be given to disadvantaged students, the uninterrupted use of some form of ability grouping is essential.

Conclusion

The nature of this decision calls for a judicial reassessment of the proper role which the courts should play in our nation's educational affairs. This reassessment should carefully consider the historical reluctance of the courts to interfere with the responsibilities of school boards and school administrators as well as the impracticalities inherent in court supervision of matters in which the courts have no expertise.

Since *Brown I*, the courts have been required to issue orders progressively more pervasive in scope in order to compel some reluctant school boards and administrators in

²³*Hobson v. Hansen, supra*, at 511, 512.

some southern states to end unconstitutional and state-imposed racial discrimination in their public school systems. Now, this district court decision improperly seeks to adopt the rationale of these cases as a justification for entering into the administration of a public school system where there has been a "good faith" effort to preserve and protect the constitutional rights of students.

The public interest and the proper administration of our nation's schools require that the judiciary realize the manifold problems inherent in this approach. Except in clear cases of constitutional violation, the judgment of the courts should not be substituted for the judgment of trained administrators. And, when a constitutional abuse is found, the responsibility for determining the manner of correction should be the province of the school boards and school administrators, subject, of course, to court review.

For the foregoing reasons, the decision of the district court should be reversed, or remanded to the district court with appropriate instructions respecting the revision of the order issued by that court.

Respectfully submitted,

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**BRIEF OF THE NATIONAL ASSOCIATION FOR
THE ADVANCEMENT OF COLORED PEOPLE AS
AMICUS CURIAE**

IN THE
United States Court of Appeals
For the District of Columbia Circuit

No. 21,167 and 21,168

CARL F. HANSEN, ET AL.,

Appellants,

v.

JULIUS W. HOBSON, ET AL.,

Appellees.

**Appeals from the United States District Court
for the District of Columbia**

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United States Court of Appeals

for the District of Columbia Circuit

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Statement of Question Presented

Are governmental policies, practices and procedures which result in a substantial denial of equal educational opportunities to Negro school children constitutionally proscribed, whether caused intentionally or otherwise?

Statement of Points

1. The Constitution is violated when, without legitimate overriding governmental purpose, the effect of governmental action impairs equal educational opportunities.

2. Application of the controlling law to the facts requires affirmance of the judgment below.

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IN THE
United States Court of Appeals
For the District of Columbia Circuit

No. 21,167

CARL C. SMUCK, A Member of the Board of Education of
the District of Columbia,

Appellant,

v.

JULIUS W. HOBSON, individually and on behalf of JEAN
MARIE HOBSON and JULIUS W. HOBSON, JR.; SAMUEL D. GRA-
HAM, individually and on behalf of BARBARA JEANE GRAHAM
and KAREN CHANDELLE GRAHAM; MARY ALICE BROWN, indi-
vidually and on behalf of CHARLES HUDSON BROWN; PAUL-
INE SMITH, individually and on behalf of MAURICE HOOD;
WILLIE DAVIS, JR., individually and on behalf of RONALD D.
DAVIS, REGINALD D. DAVIS and MYOSHI J. DAVIS; JAMES K.
WARD, individually and on behalf of CHRYCYNTHIA ELAIN
WARD; JOYCE M. MARKEL, individually and on behalf of
MICHELLE I. MAKEL; and CAROLYN HILL STEWART,

Appellees.

No. 21,168

CARL F. HANSEN, Superintendent of Schools of the District
of Colombia,

Appellant,

v.

JULIUS W. HOBSON, individually and on behalf of JEAN
MARIE HOBSON and JULIUS W. HOBSON, JR.; SAMUEL D. GRA-
HAM, individually and on behalf of BARBARA JEANE GRAHAM
and KAREN CHANDELLE GRAHAM; MARY ALICE BROWN, indi-
vidually and on behalf of CHARLES HUDSON BROWN; PAUL-
INE SMITH, individually and on behalf of MAURICE HOOD;
WILLIE DAVIS, JR., individually and on behalf of RONALD D.
DAVIS, REGINALD D. DAVIS and MYOSHI J. DAVIS; JAMES K.
WARD, individually and on behalf of CHRYCYNTHIA ELAIN
WARD; JOYCE M. MARKEL, individually and on behalf of
MICHELLE I. MAKEL; and CAROLYN HILL STEWART,

Appellees.

Summary of Argument

1. The right of Negro school children to equal educational opportunities is a preferred right which is entitled to substantial, not minimal, protection under the Constitution because of our basic abhorrence of invidious racial classifications and because of the primary importance of education in our society. For these reasons, any unjustified governmental action, or inaction which has the effect of denying equal educational opportunities to Negroes as a group, is a violation of the government's obligation under the Constitution, unless a legitimate overriding governmental purpose is shown upon application of the strictest standards.

2. Since the trial court found, with ample justification, that the purpose or effect of the challenged policies, programs and practices of the appellants, results in a substantial denial of equal educational opportunities to Negro school children; and since the appellants have failed to justify their policies, programs and practices on the basis of any overriding governmental purpose sufficient to sustain these racial classifications, Amicus respectfully submits that the judgment appealed from must be affirmed.

IN THE
United States Court of Appeals
For the District of Columbia Circuit

No. 21,167
CARL C. SMUCK, etc.,
Appellant,
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JULIUS W. HOBSON, et al.,
Appellees.

No. 21,168
CARL F. HANSEN, etc.,
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JULIUS W. HOBSON, et al.,
Appellees.

**BRIEF OF THE NATIONAL ASSOCIATION FOR
THE ADVANCEMENT OF COLORED PEOPLE AS
AMICUS CURIAE**

Statement of Interest

The National Association for the Advancement of Colored People is a New York non-profit membership corporation with over 1,700 local affiliates in 50 states. The NAACP includes among its aims and purposes securing to Negroes full and equal citizenship rights and freeing them from the onerous barriers, restrictions, exploitations and

burdens of race. A specific and immediate objective of the NAACP is to secure equal educational opportunities for all Negro school children consistent with the Association's conviction that education is of vital importance in the struggle for equality in the United States. Prior to *Brown v. Board of Education*, the NAACP was in the forefront of the fight to destroy the barriers to the education of Negro children in America, and thereafter it continued to lead the fight to implement that decision.

The National Association for the Advancement of Colored People is vitally concerned about the issues raised in the appeal of this case. The scope of the decision in *Hobson v. Hansen* is broad and vitally affects education throughout the United States. Legislatively required segregation in public schools in the South has begun to reflect the patterns of segregation which have long existed in the north and west for many years. The decision in this case will have a material impact on educational practices in the United States, and will severely affect the time factor within which educational opportunities will, in fact, meet constitutional requirements.

It is because of the overriding public consequences of the decision in this case that the National Association for the Advancement of Colored People is filing this brief as *amicus curiae*. Filing is with the consent of the parties, in accordance with Rule 31(k) of this Court.

I. Statement

1. Background

The court below made a thorough and exhaustive analysis of the programs, practices and procedures of the District of Columbia school system. What follows is a summary of the court's findings.¹

¹ All citations are from the opinion below reported at 269 F. Supp. 401 (D.D.C. 1967).

Prior to the decision in *Bolling v. Sharpe*, 347 U.S. 497 (1954), the public schools of the District of Columbia were racially segregated pursuant to law. There existed two divisions, one for white students and one for Negro students, "each with its own elementary and junior and senior high schools, each with teaching and administrative personnel of the one race only" (at 408). According to the Strayer Report issued in 1949, schools of the District of Columbia were separate but not equal (at 408). Circuit Judge Edgerton thoroughly documented the inferiority of the Negro schools in his dissenting opinion in *Carr v. Corning*, 86 U.S. App. D.C. at 22-33, just few months prior to *Brown v. Board of Education*, 347 U.S. 483 (1954). Classrooms, buildings, curricula, counseling services, textbooks, teachers and services available to Negro students were drastically inferior to those available to white students in the District of Columbia (at 408).

Pursuant to the mandate of the Supreme Court in *Bolling v. Sharpe*, *supra*, the Board of Education for the District of Columbia prepared and published a plan for desegregation of the District of Columbia public school system which took effect in September of 1955 (at 409). According to the provisions of the plan, a neighborhood school policy was created which provided for mandatory student attendance at specified schools within defined geographical boundaries (at 409). The plan, however, contained exemptions which permitted students in certain areas to select one among several schools or to transfer from their neighborhood school for "psychological" reasons (at 409). Accordingly, individual white students "who were seriously upset by the prospect of integration were suffered on an individual basis to transfer to white schools, in the teeth of the 1954 Board order ruling expressly to the contrary" (at 415). Furthermore, the plan contained an "optional feature" which allowed all students then within the school system to remain in the school they attended in 1954 until

graduation, notwithstanding the fact that their 1954 school was not their neighborhood school (at 415). Due to residential pattern within the District, the adoption of a neighborhood school plan invariably led to continuation of segregation in the District of Columbia school system. As the court below found, there exists "massive actual segregation" within the District of Columbia school system even after the institution of the neighborhood schools (at 412).

2. School Personnel

From 1882 until 1962, some 80 years, the nine member Board of Education for the District of Columbia, which is appointed by the Judges of Washington's Federal District Court, had three Negro members (at 421). Since 1962 Negro membership on the Board of Education has increased to four (at 421). Prior to *Bolling v. Sharpe, supra*, the faculties of the District of Columbia schools were completely segregated. Continuing thereafter and "to a significant if not startling degree teachers and principals have been assigned to schools where their own race mirrors the racial composition of the schools' student bodies. In a nutshell, white schools are usually paired with white faculties, Negro schools with Negro faculties; and integrated schools have integrated faculties" (at 425). Immediately after *Bolling v. Sharpe, supra*, the Board of Education announced that thereafter all faculty assignments would be on the basis of merit and not race; but that the then existing faculty segregation would not be disturbed (at 426). Principalships as they exist prior to *Bolling v. Sharpe, supra*, were also continued under the 1955 plan (at 409). Moreover, in the District of Columbia principal assignments are functionally related to teacher assignments since principals are normally promoted from teachers' ranks of the subject schools (at 430).

3. Physical Disparities

(a) *Buildings.* Schools attended by predominantly Negro student bodies are fairly new or very old, while student bodies which are predominantly white attend schools in structures built during the early 20's or late 30's (at 431). Yet schools located in the ghetto areas have a disproportionate share of ancient structures "the median age of a ghetto school is almost 60 years. The comparable age for schools with predominantly Negro enrollments in the middle income or middle class neighborhoods is only 41 years" (at 431). Except for schools recently constructed, those west of Rock Creek Park, which are predominantly white, are considered to be in better physical condition than those found in predominantly poor Negro neighborhoods (at 432). Most slum schools are "8-room buildings with very large classrooms, poor natural lighting, large cloakrooms, huge open central hallways, basement toilets, and small paved play spaces, or no play space at all" (at 432). In fact, according to the Strayer Report of 1949, 43 schools were so inferior that further investment was considered wasteful (at 432) but "it is a melancholy fact that 18 of the elementary schools, two junior and one senior high [condemned by the Strayer Report] continue in use today as regular school buildings" (at 432). Twenty of these condemned schools are presently being used to house student bodies which are 85-100% Negro (at 432). The one remaining building houses a student body which is 67-85% Negro (at 432). All but one are located in slum areas (at 432).

(b) *Libraries.* Books, libraries and librarians are in drastically short supply in the District of Columbia system,—an average of $\frac{1}{2}$ book per student—yet the predominantly white schools west of Rock Creek Park have no such scarcities (at 433). "There the median library books per student tally was a more impressive four and one-third" (at 433). Although all white elementary schools have libraries and librarians, the same is true

of only 64% of the predominantly Negro schools and only 47% of predominantly Negro schools located in slum areas (at 433). Of the latter, thirty were described by the court as "plainly makeshift and inadequate, 'a scrounging operation' " (at 433).

(c) *Enrollment.* Enrollment is below capacity in all but two predominantly white schools, where enrollment is at capacity; in most predominantly Negro schools and particularly those located in slum areas, enrollments are far above their maximum capacity (433); "the disparity between the patterns of overcrowding in predominantly Negro and white schools is of very striking force. Inequalities apart, the overcrowding in the predominantly (85-100%) Negro schools is of fearsome dimensions. These schools are in, as one school official volunteered, an 'emergency situation'. In practical terms, what overcrowding entails is larger classes, the shoe-horning of students into spaces never intended to be used as classrooms, thereby depriving the schools of the auxiliary uses for which they were designed and in the few worst schools, split or double sessions" (at 434).

(d) *Teachers.* Teachers in the predominantly white schools west of Rock Creek Park have "significantly greater teaching experience than the faculties at the Negro elementary schools" (at 434). Moreover, temporary teachers, who by definition are unqualified by District of Columbia standards, constituted 40% of all teachers in 1964-65 (at 435). Few temporary teachers are employed in predominantly white schools west of Rock Creek Park, while the overwhelming majority are employed in predominantly Negro schools, and particularly in ghetto area schools (at 435).

(e) *Expenditure.* Expenditures for text books and supplies are based upon attendance figures for the previous year, a system which redounds to the prejudice of schools with expanding enrollments, i.e., predominantly Negro and

ghetto schools (at 436). Notwithstanding an apparent specific statutory prohibition, the school administration has used federal poverty funds to purchase textbooks for the predominantly white schools west of Rock Creek Park (at 436). Apparently as a result of increased federal funds earmarked for ghetto schools, all schools now meet the established minimal textbook levels (at 436). However, "these facts (minimal textbook levels) fall short, of course, of guaranteeing that the depth of these materials at the various schools, accumulated through the years, is equitably in balance, and the court is aware of repeated complaints in the community of the outright absence of textbooks in some schools" (at 436). There are "spectacular differentials" in the per pupil expenditures between predominantly white and predominantly Negro schools (at 437). Only \$292 per pupil was expended at predominantly Negro schools while \$392 was expended per pupil at predominantly white schools—a difference of \$100 per pupil. "A review of the rankings further reveals that five of the eight highest-cost schools were predominantly white, while of the 25 cheapest schools, 23 were predominantly Negro and all 25 were more than half Negro. A quick rearrangement of the data uncovers this even more troublesome fact: the median per pupil expenditure for the 13 elementary schools west of the Park was \$424." (Emphasis in original) (at 437).

(f) *Kindergarten*. Although attendance is not required by law, all white children west of Rock Creek Park who wished to attend kindergarten were able to do so, while most of the Negro children east of Rock Creek Park were unable to attend kindergarten due to a lack of space (at 438-9).

4. The Track System

The District of Columbia school system employs a track system pursuant to which students are placed in curriculum levels according to an assessment of the "student's ability to learn" (at 442). The track system was instituted in

1956 shortly after the *Bolling v. Sharpe* decision. Its originator, appellant Hansen, concedes that: "to describe the origin of the four-track system without reference to desegregation in the District of Columbia Public Schools would be to by-pass one of the most significant causes of its being" (at 442). The theory behind the track system is to identify the various student types; "the intellectually gifted, the above-average, the average, and the retarded" (at 444). Next it is assumed that the ability of each student may be accurately ascertained and that a curriculum can be devised to allow the student to achieve his full potential (at 444). Thus, each track possesses a self-contained curriculum with an educational content varying according to the level of the track (at 445). The lowest track is the Basic or Special Track for retarded students. A General Track is provided for average and above average students at the elementary and junior high school levels. A Regular Track is provided on the high school level for above average students. Lastly, an Honors Track is provided for intellectually gifted students (at 445).

Admission to the Honors Track, which begins in the fourth grade is secured through recommendations of the principal and a teacher (at 446). The course of study is an accelerated and enriched version of the standard curriculum (at 447). The Regular Track which operates only at the high school level, is also a college preparatory track (at 447). Admission to it is based upon certain criteria generally including a "high normal I.Q., or above" (at 447). The General Track, which serves the bulk of the students, is designed for students "who plan to go to work immediately upon graduation" (at 447). Thus the General Track is vocationally oriented and does not prepare a student for college level work (at 448). The Basic or Special Track is designed for "slow learners," the "retarded," and the "stupid" (at 448). The curriculum

concentrates on reading and arithmetic (at 448). "School policy used to be that students identified as belonging in the Special Academic Track were mandatorily required to enroll in that curriculum. 'Admission to the upper three curricula should be selective. The student who is ineligible because of low achievement should not be admitted to the traditional high school program.' This policy, followed in elementary and junior high schools as well as in the high schools, was amended in the fall of 1965 to require parental consent for Special Academic placement. Most parents, however, acquiesce in the school's recommendation" (at 448). Appellant Hansen has stated that "teachers in the Special Academic Track need to be specially prepared to deal with the special problems that characterize slow learners. The great majority of those teaching in the Special Academic Track, however, either have had no formal training in special education or have had very little. About half of the teachers are nontenure or temporary" (at 449).

The special track curriculum is essentially a watered down version of the standard curriculum with primary emphasis on the basic subjects of reading, English, and arithmetic (at 449). At the high school level "the curriculum focuses on preparing the student for a variety of low-skill vocations" (at 449).

As a general rule, there is a correlation between the income level for a neighborhood and the track assigned to students from that neighborhood (at 451-456). Thus, Dunbar, a ghetto high school, has not had an honors track since at least 1961, and few of Dunbar's students are enrolled in the regular, or college preparatory track (at 453). On the other hand, Wilson high school, which is located in the high income predominantly white area, has a large number of Honors and Regular Tracks students but has not had a Special or Basic Track since 1961 (at 453). The same correlation exists on the junior high school level (at 453-454).

There also exists a very strong nexus between the racial characteristics of a neighborhood and the track assigned to residents of that neighborhood (at 456-457). Over 93% of the students in low income neighborhoods are Negro, and few of these students are in the Honors or Regular Tracks. On the other hand, the two high schools servicing predominantly white neighborhoods have the highest number of students enrolled in the Honors and Regular Tracks (at 451). On the junior high school level, all schools with significant white enrollments, including two servicing middle income neighborhoods, have Honors Tracks, whereas 40% of the predominantly Negro junior high schools do not (at 452). In fact only two of the six middle income all-Negro junior high schools have honors courses (at 455). The same pattern is true on the elementary school level with the great majority of predominantly Negro schools not even offering an Honors Track program (at 455). In fact, a mere 16% of all of Negro elementary school children attend schools which offer an Honors program, while 70% of all white students attend schools providing these benefits at (455-456). There is a disproportionately high number of Negroes enrolled in the Basic Track while the white enrollment in the Special or Basic Track is disproportionately low (at 456). In fact, "in those schools with a significant number of both white and Negro students a higher proportion of the Negroes will go into the Special Academic Track than will the white students" (at 456). The same disproportionate results occur in the five junior high schools with significant bi-racial enrollment (at 457). It was observed that: "First, tracking tends to separate students from one another according to socio-economic and racial status, albeit in the name of ability grouping. Second, the students attending the lower income predominantly Negro schools— a majority of District school children— typically are confined to the educational limits of the Special Academic or General Track" (at 457).

As observed earlier, because of socio-economic and racial correlations the poorer Negro students for the most part receive the limited offerings of the General and Special Academic Tracks. But more than that, "there is a total absence of any Honors programs at a substantial number of schools—, almost all of them having predominantly Negro enrollments" (at 458).

Although in theory the track system is designed to enable a student to achieve his maximum potential, there is little if any flexibility in the track system (at 461). Upgrading at all levels and from all tracks is seriously limited which the court below concluded is the fault of "the system and not with any innate disabilities of the student" (at 461).

Students are placed in various tracks principally on the basis of tests and evaluations given in the first, second, sixth, ninth and eleventh grades, with optional tests in the seventh, ninth or twelfth grades (476). These tests place a heavy reliance on achievement and aptitude scores, including I.Q. levels (at 475). Under the present program a student tested according to the mandatory schedule will be examined a total of 11 times—six aptitude tests, and three of the five achievement tests, are given in elementary school with one of each given in both junior and senior high school levels (at 476). "Under such a program a student may go as many as three years without undergoing new tests (sixth grade to ninth grade; ninth grade to 11th grade), so that his most recent test scores may be as much as three years old" (at 476). There exists also the "distinct possibility that students are not seriously reevaluated for upgrading except when the time for mandatory testing comes around" and that interim evaluations are based on stale data (at 476).

Turning now to the crucial area of test validity, there are two primary tests used to evaluate and place students. First, achievement tests are used to determine a student's

level of attainment in a given subject. Scholastic aptitude tests are also used in an attempt to predict future academic achievement levels (at 477). This test measures a student's verbal skills and the student's command of standard English and grammar (at 478). Only one series of scholastic aptitude tests has a non-verbal component (at 478). With respect to the validity of these tests as a basis for the classification of children the court concluded: "Regarding the accuracy of aptitude test measurements, the court makes the following findings. First, there is substantial evidence that defendants presently lack the techniques and the facilities for ascertaining the innate learning abilities of a majority of District school children. Second, lacking these techniques and facilities, defendants cannot justify the placement and retention of these children in lower tracks on the supposition that they could do no better, given the opportunity to do so" (at 488).

ARGUMENT

I.

The Constitution is violated when, without legitimate overriding governmental purpose, the effect of governmental action impairs equal educational opportunities.

A. The right to equal educational opportunities is a preferred right under the Constitution.

Amicus submits that the decision of the court below is constitutionally compelled in view of the fact that the right of Negro children to an education—unimpaired by racial discrimination of any character whatsoever—is a basic preferred right accorded substantial, not minimal, protection under the scheme of the Constitution.

The right to equal educational opportunities is a "basic civil right of man", *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). More important, the right to equal educational opportunities is, like the right to vote, "a fundamental political right, because preservative of all rights". *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

In *Sweatt v. Painter*, 339 U.S. 629 (1950), the Supreme Court concluded that the right asserted by the Negro plaintiff to an education equal in all respects to that of a white student similarly situated was a fundamental personal right. On the same day, the Court in *McLaurin v. State Regents*, 339 U.S. 637 (1950), held that restrictions placed upon the Negro petitioner's participation in the academic process violated his constitutional right to equal educational opportunities, notwithstanding the fact that he was admitted to the then all-white University of Oklahoma. Of particular significance is the statement of the Court that the restrictions placed upon McLaurin "impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession" (*Ibid.* at 641). On this basis, the Court concluded that McLaurin's education was "unequal to that of his classmates" (*id.*).

In fact a major premise underlying the decisions in *Brown v. Board of Education*, *supra*, and *Cooper v. Aaron*, *supra*, was the importance of education—free from the arbitrary and irrelevant consideration of racial discrimination. Mr. Chief Justice Warren noted in *Brown*, at 494, that "Education is the very foundation of good citizenship" while in *Cooper*, *supra*, at 19, all of the Justices concluded that:

[t]he right of a student not to be segregated on racial grounds in schools so maintained is indeed *so fundamental and pervasive* that it is embraced in the concept of due process of law. (emphasis added)

Congress also recognized the preferred position accorded equal educational opportunities in our society when

it ordered the Department of Health, Education and Welfare to conduct a survey of educational opportunities:

In view of the fundamental significance of educational opportunity to many important social issues today. . . . Coleman, *Equality of Educational Opportunity* at 1.

Accordingly, making available equal educational opportunities should now be considered as an essential public function required of government. Cf. *Evans v. Newton*, 382 U. S. 296 (1966); *Griffin v. Prince Edward County*, 377 U. S. 218 (1964). Whatever the basic importance of education, generally, in our society it is nothing short of critical for Negroes because of the very real correlation between education and employment, income and anti-social conduct. See, generally, Coleman, *Equality of Education Opportunity* and U. S. Commission On Civil Rights, *Report On Racial Isolation in the Public School*.

Judge Wright demonstrated his awareness of the critical importance of the right to equal educational opportunities for Negro school children in our society, underscoring the reasons this right has been accorded a preferred position in our constitutional scheme, when he stated at pages 504-505:

Segregation in the schools precludes the kind of social encounter between Negroes and whites which is an indispensable attribute of education for mature citizenship in an interracial and democratic society. Segregation "perpetuates the barriers between the races; stereotypes, misunderstandings, hatred and the inability to communicate are all intensified." Education, which everyone agrees should include the opportunity for biracial experiences, carries on, of course, in the home and neighborhood as well at school. In this respect residential segregation, by ruling out meaningful experiences of this type outside of school, intensifies, not eliminates, the need for integration within school.

B. In determining whether there has been a violation of preferred constitutional rights by governmental action or inaction a higher and stricter standard is applied.

Amicus submits that whenever governmental action or inaction results in a denial of equal educational opportunity to black school children as a class, as is true in this case, a constitutional violation has been established, unless the deprivation can be justified as necessitated by some legitimate overriding governmental purpose. In such instances, it is not enough to show that the government acted reasonably. Here the standard is considerably higher and stricter—the burden is on the government to prove and justify the action as mandated by a more vital governmental concern. This is the underlying rationale in *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Bolling v. Sharpe*, 347 U.S. 497 (1954); *McLaughlin v. Florida*, 379 U.S. 184 (1964); and *Loving v. Virginia*, 388 U.S. 1 (1967).

While every racial classification is not constitutionally impermissible, *McLaughlin v. Florida*, *supra*, makes clear that this form of governmental action is measured by the severest constitutional standards. Thus, the Court said at pages 191-192:

... we deal here with a classification based upon the race of the participants, which must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States. This strong policy renders racial classifications "constitutionally suspect," *Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S. Ct. 693, 694, 98 L. Ed. 884; and subject to the "most rigid scrutiny," *Korematsu v. United States*, 323 U.S. 214, 216, 65 S. Ct. 193, 194, 89 L. Ed. 194; and "in most circumstances irrelevant" to any constitutionally acceptable legislative purpose, *Kiyoshi Hirabayashi v. United States*,

320 U.S. 81, 100, 65 S. Ct. 1375, 1385, 87 L. Ed. 1774. Thus it is that racial classifications have been held invalid in a variety of contexts. See, e.g., *Tancil v. Woolls* (Virginia Board of Elections v. Hamm), 379 U.S. 19, 85 S. Ct. 157 (designation of race in voting and property records); *Anderson v. Martin*, 375 U.S. 399, 84 S. Ct. 454, 11 L. Ed. 2d 430 (designation of race on nomination papers and ballots); *Watson v. City of Memphis*, 373 U.S. 526, 83 S. Ct. 1314, 10 L. Ed. 2d 529 (segregation in public parks and playgrounds); *Brown v. Board of Education*, 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (segregation in public schools).

Our inquiry, therefore, is whether there clearly appears in the relevant materials some overriding statutory purpose requiring the proscription of the specified conduct when engaged in by a white person and a Negro, but not otherwise.

Thereafter, in *Loving v. Virginia*, 388 U.S. 1 (1967), the Court rejected the argument "that the mere 'equal application' of a statute containing racial classifications is enough" to satisfy the command of the Constitution. Rather, the Court asserted at page 11 that:

At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the "most rigid scrutiny," *Korematsu v. United States*, 323 US 214, 216, 89 L ed 194, 198, 65 S Ct 193 (1944), and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate. Indeed, two members of this Court have already stated that they "cannot conceive of a valid legislative purpose which makes the color of a person's skin the test of whether his conduct is a criminal offense." *McLaughlin v. Florida*, supra, 379 US at 198, 13 L ed 2d at 232 (Stewart, J., joined by Douglas, J., concurring).

C. A functional approach, based upon effect rather than intent, is the appropriate means to determine whether a preferred constitutional right is violated.

Since "law addresses itself to actualities" *Griffin v. Illinois*, 351 U.S. 12, 23 (1956), we contend that the characterization of a denial of equal educational opportunity as "de facto" or "de jure" is singularly immaterial. *Amicus* submits that when, as in the instant case, equal educational opportunities are denied, whether "ingeniously or ingenuously", *Cooper v. Aaron*, 358 U.S. 1, 17 (1958); or by way of "sophisticated as well as simple-minded modes of discrimination" the Constitution is violated. *Lane v. Wilson* 307 U.S. 268, 275 (1939). We insist that the right of Negro school children to equal educational opportunities is not a semantic game but rather a basic constitutional right which must be dealt with in terms of realities:

it is of no moment whether the segregation is labelled by the defendant as "de jure" or "de facto", as long as the Board, by its conduct, is responsible for its maintenance.

Constitutional rights are determined by realities, not by labels or semantics. *Taylor v. Board of Education*, 191 F. Supp. 181, 194 (S.D.N.Y. 1961).

For this reason, we support Judge Wright's basic premise that the Constitution prohibits any policy or practice, the purpose or effect of which results in the denial of equal educational opportunities. As Judge Wright observed at page 497:

* * * the law is too deeply committed to the real, not merely theoretical (and present, not deferred) equality of the Negro's educational experience to compromise its diligence for any of these reasons when cases raise the rights of the Negro poor. Further, the inequality of a predominantly Negro school is most often no mere random fortuity unlikely to persist

or recur, as these proposed rules impliedly regard it. It is instead just one more exemplification of a disheartening and seemingly inexorable principle: *segregated Negro schools, however the segregation is caused*, are demonstrably inferior in fact. (Emphasis added.)

If *amicus* is correct in its basic assumption, then certainly the student, teacher and principal placement policies as described above as well as the track system, the unequal allocation of educational resources, and de facto segregation are patently unconstitutional.

Whatever the case law might have been, it is now beyond dispute that "any device which 'promote[s]' or inevitably 'lends itself' to segregation is unconstitutional." *Goss v. Board of Education*, 373 U.S. 683, 686 [1963]. This pragmatic and functional approach was recently reaffirmed by the Supreme Court in a series of decisions handed down on May 27, 1968. In *Green v. County School Board of New Kent County, Virginia*, — U.S. — (1968), 36 L.W. 4476 the Court unanimously held:

School Boards such as the respondent then operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch. * * * The constitutional rights of Negro school children articulated in *Brown I* permit no less than this; and it was to this end that *Brown II* commanded school boards to bend their efforts.

• • •

The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*. (Emphasis on original.)

See also *Monroe v. Board of Commissioners of the City of Jackson, Tenn.*, — U.S. — (1968), 36 L.W. 4480; *Raney v. The Board of Education of the Gould School District*, —

U.S. — (1968), 36 L.W. 4483. Prior to *Green, supra*, Courts in the First, Second, Third, Fourth, Fifth, Eighth and Tenth Circuits had achieved a similar result. See *Barksdale v. Springfield School Committee*, 237 F. Supp. 543 (D. Mass. 1965), vacated on other grounds, 348 F. 2d 261 (1st Cir. 1965); *Blocker v. Board of Education of Manhasset*, 226 F. Supp. 208 (E.D. N.Y. 1964); *Branche v. Board of Education of the Town of Hempstead*, 204 F. Supp. 150 (E.D. N.Y. 1962); *Bowman v. County School Board*, 382 F. 2d 326 (4th Cir. 1967) (Sobeloff, C.J. concurring); *Kemp v. Beasley*, 389 F. 2d 17 (8th Cir. 1968); *United States v. Jefferson County Board of Education*, 372 F. 2d 836 (5th Cir. 1966), aff'd en banc 380 F. 2d 385 (5th Cir. 1967), cert. denied, — U.S. — (1967); *Evans v. Ennis*, 281 F. 2d 385 (3rd Cir. 1960). *Board of Education of Oklahoma City Public Schools v. Dowell*, 375 F. 2d 158 (10th Cir. 1967).

In the *Jefferson County* case, *supra*, the Fifth Circuit disposed once and forever of the artificial distinction between “desegregation” and “integration” by rejecting the infamous dictum of *Briggs v. Elliott*, 132 F. Supp. 776, 777 (E.D. S.C. 1955) that “The Constitution . . . does not require integration. It merely forbids discrimination.” In its place, the Court adopted the functional approach of *Green, supra*.

The only school desegregation plan that meets constitutional standards is one that works. (372 F. 2d at 847)

* * *

The position we take . . . is that *the only adequate redress for a previously overt system-wide policy of segregation directed against Negroes, as a collective entity is a system-wide policy of integration.* (372 F2d at 869) (Emphasis in original.)

In reaffirming the above decision en banc the Fifth Circuit articulated its present attitude with unmistakable clarity:

The Court holds that boards and officials administering public schools in this circuit have the affirmative duty under the Fourteenth Amendment to bring about an integrated, unitary school system in which there are no Negro schools and no white schools—just schools. Expressions in our earlier opinions distinguishing between integration and desegregation must yield to this affirmative duty we now recognize.

* * *

Freedom of choice is not a goal in itself. It is a means to an end. A school child has no inalienable right to choose his school. A freedom of choice plan is but one of the tools available to school officials at *this stage* of the process of converting the dual system of separate schools for Negroes and whites into a unitary system. The governmental objective of this conversion is—educational opportunities on equal terms to all. The criterion for determining the validity of a provision in a school desegregation plan is whether the provision is reasonably related to accomplishing this objective. 380 F. 2d at 389-390.

All of the cases discussed so far, whether characterized as “de jure” or “de facto” proceed from the functional premise that:

The central constitutional fact is the inadequacy of segregated education. * * * The educational system that is thus compulsory and publicly afforded must deal with the inadequacy arising from adventitious segregation; it cannot accept and indurate segregation on the ground that it is not coerced or planned but accepted. *Branche v. Board of Education*, 204 F. Supp. at 153.

In *Barksdale, supra*, at 546, the District Court framed the issue as “whether there is a constitutional duty to provide equal educational opportunities for all children within the system” and concluded that such a duty existed. More important, the Court held that a segregated education, however arrived at, was incapable of providing an equal educational opportunity. See also *Balaban v. Rubin*, 40 Misc.

2d 249, 242 N.Y.S. 2d 973 (Sup. Ct. 1963), rev'd, 20 A.D. 2d 438, 248 N.Y.S. 2d 574 (2d Dept.), aff'd 14 N.Y. 2d 193, 250 N.Y.S. 2d 281, 199 N.E. 2d 375 (1964), cert. denied, 379 U.S. 881, 85 S.Ct. 148, 13 L.Ed. 2d 87 (1964); *Morean v. Board of Education of Town of Montclair*, 42 N.J. 237, 200 A.D. 2d 97 (1964); *Jackson v. Pasadena City School District*, 59 Cal. 2d 876, 31 Cal.Rptr. 606, 382 P.2d 878 (1963).

Certainly, a functional approach to the problem of equal educational opportunities in public schools should not come as a great surprise since the Supreme Court in *Brown v. Board of Education*, 347 U.S. 483 (1954) based its decision upon the underlying importance of education and its relationship to our entire American society.

[Education] is the very foundation of good citizenship. Today it is a principle instrument in *awakening the child to cultural values*, in preparing him for later professional training, and in *helping him to adjust normally to his environment*. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms 347 U.S. at 493, (Emphasis added.)

* * *

To separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. 347 U.S. at 494. (Emphasis added.)

The relevance of the Court's observation in *Brown, supra*, has recently been reemphasized by the U.S. Commission on Civil Rights in its report on Racial Isolation in the Public Schools:

The central truth which emerges from this report and from all of the Commission's investigations is simply this: Negro children suffer serious harm

when their education takes place in public schools which are racially segregated, whatever the source of such segregation may be.

Negro children who attend predominantly Negro schools do not achieve as well as other children, Negro and white. * * *

* * *

* * * Negro children believe that their schools are stigmatized and regarded as inferior by the community as a whole. Their belief is shared by their parents and by their teachers. And their belief is founded in fact.

* * * Negroes in this country were first enslaved, later segregated by law, and now are segregated and discriminated against by a combination of governmental and private action. They do not reside today in ghettos as the result of an exercise of free choice and the attendance of their children in racially isolated schools is not an accident of fate wholly unconnected with deliberate segregation and other forms of discrimination. In the light of this history, the feelings of stigma generated in Negro children by attendance at racially isolated schools are realistic and cannot easily be overcome. 1 RACIAL ISOLATION IN THE PUBLIC SCHOOLS, A REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS (1967), p. 193.

Earlier in its landmark report the Commission discussed the real and detrimental effects denials of equal educational opportunities have upon the lives and opportunities of poor Negro children.

Racial isolation in the schools tends to lower students' achievement, restrict their aspirations, and impair their sense of being able to affect their own destiny.

By contrast, Negro children in predominantly white schools more often score higher on achievement tests, develop higher aspirations, and have a firmer sense of control over their own destinies.

Differences in performance, attitudes, and aspirations occur most often when Negroes are in majority-white schools. Negro children in schools that are majority-Negro often fail to do better than Negro children in all-Negro schools. In addition, the results stemming from desegregated schooling tend to be most positive for those Negro children who began their attendance at desegregated schools in the earlier elementary grades.

An important contributing element to the damage arising from racially isolated schools is the fact that they often are regarded by the community as inferior institutions and students and teachers sense that their schools are stigmatized. This has an effect on their attitudes which influences student achievement.

Racial isolation also appears to have a negative effect upon the job opportunities of Negroes. Negro adults who experienced desegregated schooling tend to have higher incomes and more often hold white-collar jobs than Negro adults who attended isolated schools. These differences are traceable to the higher achievement levels of the Negroes from desegregated schools, and, in part, to the fact that association with whites often aids Negroes in competing more effectively in the job market.

Attendance in racially isolated schools tends to generate attitudes on the part of Negroes and whites that lead them to prefer association with members of their own race. The attitudes appear early in the schools, carry over into later life, and are reflected in behavior. Both Negroes and whites are less likely to have associations with members of the other race if they attended racially isolated schools. Racial isolation not only inflicts educational damage upon Negro students when they are in school, it reinforces the very attitudes and behavior that maintain and intensify racial isolation as well.

Moreover, the absence of interracial contact perpetuates the sense that many whites have that Negroes and Negro schools are inferior.

Racial isolation in schools has apparent effects on both Negro children and adults. This effect can

be direct and obvious—as in impaired achievement and aspirations. It can be indirect and subtle—as in the negative interracial attitudes and behavior which further perpetuate the racial isolation. In either case, it contributes to the continuing process of damage and isolation. (at 114.)

See also Coleman, *Equality of Educational Opportunity*. Certainly, it is fair to conclude that equal educational opportunities are mythical at best, without as much integration as is reasonably possible. Obviously, equal educational opportunities in the District of Columbia cannot mean that all Negro children have a right to attend a fully integrated school since the overwhelming number of students in the system are Negro. However, this does not mean that the school board may intentionally or otherwise permit the continued existence of the all-white enclave west of Rock Creek Park. To allow a continuation of present program, practices and policies also allows the continuation of two separate school systems, in the District of Columbia, one, which is inferior for Negro children and one, which is superior for white children. Clearly, no other result is possible due to the combination of housing discrimination and the neighborhood school policy. The effect of these factors was underscored by Judge Wright when, after examining their effect, he concluded:

The upshot is a cluster of schools, physically set apart by the Park, primarily white and objectively superior, essentially constituting a school system unto itself. (at 506 n. 195)

Of course *Brown, supra*, and many of its progenies dealt with dual systems once maintained by state law (as is true in the instant cause), but the Court never suggested that the injury to Negro children—the predicate for *Brown*—was removed or even lessened because school officials permitted segregation to occur or failed to act affirmatively to provide equal educational opportunities. In fact the Court in *Brown* approved a finding of the lower court that:

'Segregation of white and colored children in public schools has a detrimental effect upon the colored children. *The impact is greater when it has the sanction of the law;*' (at 494) (emphasis added)

Likewise in *Taylor v. Board of Education*, 191 F.Supp. 181 (S.D.N.Y. 1961) affd. 294 F. 2d 36 (2 Cir. 1961) the court specifically addressed itself to and rejected the contention that a different standard applied to denials of equal educational opportunities occurring from other than a state mandated dual system of schools.

this contention misconstrues the underlying premise of the *Brown* rationale. That opinion, while dealing with a state-maintained dual system of education, was premised on the factual conclusion that a segregated education created and maintained by official acts had a detrimental and deleterious effect on the educational and mental development of the minority group children.

* * *

The Court further emphasized the necessity of giving these minority-group children the opportunity for extensive contact with other children at an early stage in their educational experience, finding such contact to be indispensable if children of all races and creeds were to become inculcated with a meaningful understanding of the essentials of our democratic way of life. That the benefits inherent in an integrated education are essential to the proper development of all children has been reiterated time and again. . . . (at 192)

Regardless of how denials of equal educational opportunities occur, the basic injury to Negro school children and our society is constant. More important, denials of equal educational opportunities do not just happen but rather governmental officials act or fail to act and it is their action that results in segregation and, therefore, a denial of equal educational opportunities. Certainly, it is of little or no consolation to a Negro child to be told that his right to

equal educational opportunities—a passport to participation in American society—is conditioned upon a fictional distinction so remote from reality that it is understood only by a handful of lawyers. “Surely, the Constitution is made of sturdier stuff”, *Blocker v. Board of Education*, 226 F.Supp. 208 at 223. Apparently, this was the belief of the panel that decided the first case of *United States v. Jefferson County*, 372 F.2d 836 (5th Cir. 1966), for they observed that:

psychological harm and lack of educational opportunities to Negroes may exist whether caused by de facto or de jure segregation, a state policy of apartheid aggravates the harm. (at 868)

Artificial distinctions, based upon the modes which produce denials of equal educational opportunities rather than functional approaches centered on reality, were rejected by the dissenters in *United States v. Jefferson County*, 380 F.2d 385 (5th Cir. 1967). They correctly observed that:

The Negro children in Cleveland, Chicago, Los Angeles, Boston, New York, or any other area of the nation which the opinion classifies under de facto segregation, would receive little comfort from the assertion that the racial make-up of their school system in the 17 Southern and border states violates because they were born into a de facto society, while the exact same racial make-up of the school system in the 17 Southern and border states violates the constitutional rights of their counterparts, or even their blood brothers, because they were born into a de jure society. All children everywhere in the nation are protected by the Constitution, and treatment which violates their constitutional rights in one area of the country, also violates such constitutional rights in another area. The details of the remedy to be applied, however, may vary with local conditions. Basically, all of them must be given the same constitutional protection. Due process and equal protection will not tolerate a lower standard, and surely not a double standard. The problem is a national one. (at 397-398)

In the first *Jefferson County* case, *supra*, the majority indicated its agreement by noting that "*Brown* points toward the existence of a duty to integrate de facto segregated schools, as well" (at 875).

Accordingly, *amicus* is in complete agreement with Judge Wright's holding at page 497 that:

The complaint that analytically no violation of equal protection vests unless the inequalities stem from a deliberately discriminatory plan is simply false . . . [W]e now firmly recognize that the arbitrary quality of thoughtfulness can be a disastrous and unfair to private rights and the public interest as the perversity of a willful scheme.

Nor are we alone in our agreement with Judge Wright, for the Fourth Circuit adopted his reasoning on May 31, 1968, in *Brewer v. School Board of the City of Norfolk, Virginia*, No. 11782, as did the Second Circuit on June 7, 1968, in *Norwalk C.O.R.E. v. Norwalk Redevelopment Agency*, No. 31761, slip opinion at 2618. Thus, the measure of compliance with the constitutional mandate to desegregate school systems is not good faith or good intention, but actual effect and results.

That the district court found unequal educational opportunities for Negro children still existing in the District of Columbia public school system is documented in its finding and conclusions, *supra*. Thus, as the Court said in *Green, supra*, at p. 4479, ". . . the court should retain jurisdiction until it is clear that state-imposed segregation has been completely removed."

Moreover, the issue whether governmental action or inaction resulting in unequal educational opportunities for Negro children must be shown to have been deliberate or intentional in order to be constitutionally invalid is clearly resolved for the purposes of the instant case on another basis.

The District of Columbia School System was one of those specifically involved in *Brown I* and *Brown II* and to which *Brown I* and *Brown II* were particularly addressed—a dual school system established and operating under compulsion of law. See *Bolling v. Sharpe*, *supra*. School boards operating such systems were required by *Brown II* to effectuate a transition to a racially nondiscriminatory school system. As reaffirmed by the Court on May 28, 1968 in *Green v. County School Board of New Kent County*, — U.S. — , 36 Law Week 4476, 4478.

... In the light of the command in that case [*Brown II*], what is involved here is the question whether the Board has achieved the “racially nondiscriminatory school system” *Brown II* held must be effectuated in order to remedy the established unconstitutional deficiencies of its segregated system. . . . School Boards such as the respondent then operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch. (Emphasis added.)

II.

The application of the controlling law to the facts requires affirmance of the judgment below.

1. Separate But Unequal

At this late date, it is difficult to conceive of any justification for the disparities in objectively measurable aspects shown to exist within the District of Columbia School System between predominantly black and predominantly white schools. *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Oklahoma State Regents for Higher Education*, 339 U.S. 637 (1950); *Sipuel v. Board of Regents*, 332 U.S. 631 (1948); *Missouri, ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

Comparative disadvantages such as those found to exist in the District of Columbia, seriously handicap the equal educational opportunities of Negro school children. See, generally, Coleman, *Equality of Educational Opportunity, supra*; U.S. Commission on Civil Rights, *Racial Isolation in the Public Schools, supra*. Indeed it is impossible for appellants to justify under *Sweatt, supra*, and *McLaurin, supra* the presence only in Negro neighborhoods of ancient and dilapidated buildings which are drastically overcrowded and understaffed by teachers of inferior quality. See *Hobson v. Hansen, supra*, 431-436. More difficult to justify under controlling law as set forth above, is the disparity in per pupil expenditures of \$100 to \$132 between predominantly Negro schools and predominantly white schools. *Ibid.*, at 436-438. Similarly, it would appear settled that the acute shortage of space for kindergarten classes in predominantly Negro schools, but not in predominantly white schools, *Ibid.*, at 438-439, represents an impermissible discrimination even under pre-*Brown* law. At an absolute minimum, the Constitution requires that the objectively measurable aspects of schools in the District of Columbia be operated on a basis of substantial equality.

2. De Jure Segregation

Since the optional school zones in the District of Columbia were admittedly "created to accommodate white families anxious not to send their children to Negro schools", *Ibid.* at 500, *amicus*, like Judge Wright, concludes that "the racial basis for the optional zones becomes not only obvious but discriminatory", *Ibid.* at 500. We condemn optional school zones because they result in massive actual segregation without the slightest justification arising out of any legitimate governmental interest. In *Goss v. Board of Education*, 373 U.S. 683 (1963), the Supreme Court invalidated an optional zone plan which is indistinguishable from that in-

volved in the present litigation. We believe it critically important to note that the Court struck down the plan in *Goss* because "it is readily apparent that the transfer system proposed lends itself to perpetuation of segregation. Indeed, the provisions can work only toward that end." *Ibid.* at 686-687. No proof of intent to discriminate was required by the Court, but rather the Court proceeded on a functional approach and voided the plan because of its segregatory effect. It is for this reason that *amicus* respectfully submits that the optional zone plan utilized by the appellants is constitutionally impermissible. Similarly, the overwhelming evidence of teacher segregation within the District of Columbia constitutes un rebuttable proof "that, despite the decision in *Bolling*, intentional teacher segregation in the District still goes on, not only separating white from Negro teachers but assigning them respectively to schools with predominantly white and Negro student bodies". *Hobson v. Hansen, supra* at 502. Since principal assignments are a derivation of teacher assignments, the intentional discriminatory impact continues. After *Rodgers v. Paul*, 382 U. S. 198 (1965) and *Bradley v. School Board*, 382 U.S. 103 (1965), there is simply no justification for the systematic segregation of teachers and principals. Consequently, the Supreme Court set guidelines for faculty desegregation apposite to this and other cases in which district courts are supervising desegregation plans. The court dismissed as without merit the suggestion that there is no relationship between faculty allocation and the adequacy of a desegregation plan.

3. De Facto Segregation

In the light of what we have set forth above it is apparent that *amicus* supports the holding of the court below that "de facto" or adventitious segregation is unconstitutional. In Washington, as in most urban areas, the occurrence of adventitious segregation results directly from

housing discrimination, which when combined with adherence to a neighborhood school policy, inevitably produces segregation of the races in public schools. *Amicus* submits that adventitious segregation cannot be justified when premised upon discrimination in housing. Since the decision below the Fourth Circuit *en banc* has had the opportunity to examine this precise issue in detail. See *Brewer v. The School Board of the City of Norfolk, Virginia*, No. 11, 782 (May 31, 1968). In *Brewer, supra*, the court concluded that "de facto" segregation is unconstitutional if "the district[s] results from racial discrimination with regard to housing." (Slip opinion at 11.) Citing *Pennsylvania v. Board of Directors of City Trusts of the City of Philadelphia*, 353 U.S. 230 (1957); *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Marsh v. Alabama*, 326 U.S. 501 (1946); *Reitman v. Mulkey*, 387 U.S. 369, 378 (1967) (*dictum*); *Griffin v. Maryland*, 378 U.S. 130 136 (1964) (*dictum*) *Watson v. Memphis*, 373 U.S. 526, 538 (1963) (*dictum*). Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 Harv. L. Rev. 564 (1964-65) and *Cooper v. Aaron*, 358 U. S. 1, 17 (1958), the court held "if residential racial discrimination exists, it is immaterial that it results from private action. The school board cannot build its exclusionary attendance areas upon private racial discrimination. Assignment of pupils to neighborhood schools is a sound concept, but it cannot be approved if residence in a neighborhood is denied to Negro pupils solely on the ground of color". Even more important is the reasoning by which the Fourth Circuit arrived at the above result. First, the court observed that the neighborhood school plan adopted by the board "[F]or all practical purposes . . . put an end to the progress that Norfolk had been making in integrating its high schools." (Slip opinion at 9.) With this case undoubtedly in mind, the court in *Brewer, supra*, also noted that "[I]t was apparent that the inevitable result of the school board's plan would be the segregation of pupils . . . With this background the

board's rejection of the alternatives suggested by the court that would lead to less segregation, and its decision to adopt a geographical zoning plan without adjusting boundary lines . . . raised an inference of discrimination that required the board to justify its conduct by clear and convincing evidence." (*id.*).

Since, in the instant cause, the only possible justification for continuing massive "de facto" segregation is the cost of bussing Negro children to under-utilized schools west of Rock Creek Park—a justification which the trial court rejected—it is obvious that adventitious segregation in the District of Columbia is unconstitutional. To hold otherwise would require this Circuit to reject the reasoning as well as the holding of the Fourth Circuit in *Brewer, supra*.

We submit that our position is buttressed by the fact that adventitious segregation produces the very same injuries to Negro school children which the Supreme Court in *Brown, supra*, and *Bolling, supra*, found to be the premise for finding a denial of equal protection and due process respectively. Moreover, *McLaurin, supra*, and *Sweatt, supra*, undeniably stand for the proposition that an essential element in the educational process is the sharing of experiences with all students—Negro and white. Therefore, "de facto" segregation, even when measured by the yardstick of pre-*Brown* law produces an unavoidable conflict of constitutional concepts. If *McLaurin, supra*, *Sweatt, supra*, *Brown, supra*, and *Bolling, supra*, are to have continuing vitality then "de facto" segregation must be unconstitutional.

It is instructive to note that in every case decided in a federal court which holds or suggests that a denial of equal educational opportunities is unconstitutional, the question of whether segregation has a damaging effect upon Negro school children has been reached and decided affirmatively. *Branche v. Board of Education*, 204 F.Supp. 150 (E.D.N.Y.

1962); *Blocker v. Board of Education*, 226 F.Supp. 208 (E.D.N.Y. 1964); *Barksdale v. Springfield School Committee*, 237 F.Supp. 543 (D.Mass. 1965) vacated on other grounds 348 F. 2d 261 (1st Cir. 1965). See also *Jackson v. Pasadena City School District*, 31 Cal. Rptr. 606, 382 P.2d 878 (1963). It is because of the vital importance of education and its interrelationship to success in other facets of our society, that the Supreme Court in *Cooper v. Aaron*, 358 U.S. 1 (1958) prohibited state participation in the denial of equal educational opportunities through any arrangement, management, funds or property.

State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws. The right of a student not to be segregated on racial grounds in schools so maintained is indeed so fundamental and pervasive that it is embraced in the concept of due process of law (at 19).

4. The Track System

The track system, at least as it operates in the District of Columbia, is a most extreme form of ability grouping which results in segregation within the classroom instead of segregation between schoolhouses. Thus, under principles already articulated, the track system is constitutionally suspect. That suspicion is hardened in view of the conclusion that:

although the track system cannot be dismissed as nothing more than a subterfuge by which defendants are attempting to avoid the mandate of *Bolling v. Sharpe*, neither can it be said that the evidence shows racial considerations to be absolutely irrelevant to its adoption and absolutely irrelevant in its continued administration. To this extent the track system is tainted. *Hobson v. Hansen, supra*, at 443.

However, we need not reach this issue for the track system utilized by appellants is vulnerable in other respects which "when tested by the principles of equal protection and due process is to deprive the poor and the majority of the Negro students in the District of Columbia of their constitutional right to equal educational opportunities." *Hobson v. Hansen, supra*, at 511. Today, it is settled law that the Constitution prohibits unreasonable classifications as well as classifications not reasonably related to some legitimate governmental interest. *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Reynolds v. Sims*, 377 U.S. 533 (1964). Therefore, if Negro children are arbitrarily placed in tracks which do not reflect their ability to learn or if the methods utilized by appellants are without reasonable relationship to the purpose of tracking—then the track system is constitutionally proscribed.

That the track system is arbitrary and that the methods used are unreasonable is clear. First, Negro children are placed in tracks on the basis of tests found to be incapable of measuring their ability to learn—the "standard" for classification. *Hobson v. Hansen, supra*, at 513-514. Indeed, it is difficult to imagine a more basic form of arbitrary classification than this. Just as important, the purpose of tracking is to allow each child to grow and develop academically to his fullest potential. Yet, placement tests are weighted against poor and Negro children; flexibility in pupil programming is simply not a reality; movement between tracks and cross-tracking are virtually non-existent; disparities in course offerings relegates a disproportionate number of Negroes to lower tracks and whites to upper tracks; disadvantaged children receive little or no remedial or compensatory education; and few, if any, students succeed in upgrading themselves. *Hobson v. Hansen, supra*, at 459-469. What is particularly crucial about these facts is that the purported validity of the track system is premised upon achieving the opposite result in each and every

one of these areas. Surely, the Constitution requires more from appellants before this Court may conclude, as a matter of law, that the methods described above have any reasonable relationship to the purpose of tracking, as the Court must do in order to overturn the decision of the court below that:

As evidence in this case makes painfully clear, ability grouping as presently practiced in the District of Columbia school system is a denial of equal educational opportunity to the poor and a majority of the Negroes attending school in the nation's capital, a denial that contravenes not only the guarantees of the Fifth Amendment but also the fundamental premise of the track system itself. *Hobson v. Hansen*, *supra*, at 443.

Conclusion

Since the Court below concluded, with more than ample justification, that appellants have denied equal educational opportunities to Negroes and the poor of the District of Columbia, *amicus* submits that this Court must affirm the judgment and mandate immediate enforcement of the order appealed from.

Respectfully submitted,

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